does not result in the lessee becoming a "controlling interest"[250] or affiliate[251] that would cause the licensee to lose its designated entity or entrepreneur status. We will require each licensee notifying the Commission about a lease involving a license still subject to entrepreneur transfer restrictions or potentially subject to unjust enrichment obligations to certify that the lease does not affect the licensee's continuing eligibility to hold a license won in closed bidding[252] or to retain bidding credit or installment payment benefits. Accordingly, nothing we do herein alters a designated entity's or entrepreneur's obligation to comply with our attribution requirements[253] or changes the rules regarding the five-year transfer restriction for C and F block licenses won in closed bidding.[254] Where a designated entity or entrepreneur licensee that is participating in the Commission's installment payment program enters into a lease that preserves its eligibility, the licensee remains fully and solely responsible for the outstanding debt amount, as reflected in our rules and any applicable financing documents.[255] To the extent that there is any conflict between the revised *de facto* control standard for spectrum leasing arrangements, as set forth in this Report and Order, and the *de facto* control standard in our rules for designated entities and entrepreneurs,[256] we will apply the latter for determinations regarding whether the licensee has maintained the requisite degree of ownership and control to allow it to remain eligible for the licenses or for other benefits such as bidding credits and installment payments.

114. *Construction/performance requirements.* In accordance with the proposal set forth in the *NPRM* and the comments received in this proceeding, we will allow licensees to rely on the activities of their spectrum lessees for purposes of complying with the build-out requirements that are conditions of the license authorization. This reliance will be permissible whether the licensee is required to construct and operate one or more specific facilities, cover a certain percentage of geographic area, reach a certain percentage of population, or provide "substantial service."

115. In addition, we determine that applicable performance or buildout requirements remain a condition of the license, and cannot be passed on to spectrum lessees even though the activities of the latter may be "counted" for purposes of measuring buildout. To the extent that a licensee seeks to rely on the activities of a spectrum lessee to meet the licensee's obligation, and for some reason the lessee fails to engage in those activities, the Commission will enforce the applicable performance or buildout requirements against the licensee, consistent with our existing rules. Similarly, to the extent there are rules relating to discontinuance of operation, the Commission will enforce these rules against the licensee regardless of whether the licensee was relying on the activities of a lessee to meet particular performance requirements.[257]

---

[250] *See* 47 C.F.R. § 1.2110(c)(2).

[251] *See* 47 C.F.R. § 1.2110(c)(5).

[252] *See* 47 C.F.R. § 24.709; *see also* 47 C.F.R. § 24.839(a)(6); Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd 16266, 16289-16291 ¶¶ 48-51 (2000) (*C/F Block Sixth Report and Order*) (the terms upon which the transfer restriction may be lifted early).

[253] *See* 47 C.F.R. § 1.2110.

[254] *See* 47 C.F.R. § 24.839.

[255] *See* paragraphs 188-189, *infra* (discussing certain requirements relating to spectrum leasing arrangements entered into by licensees that are participating in the Commission's installment payment program).

[256] *See* 47 C.F.R. § 1.2110.

[257] Accordingly, whenever a licensee must file with the Commission submissions establishing that it has met the particular buildout or performance requirements that are conditions of the license authorization, the (continued....)

116. *Policies and rules relating to competition.* Assessment of potential competitive effects of transactions, whether they be transfers of control, license assignments, or spectrum leasing arrangements, remains an important element of our policies to promote facilities-based competition and guard against the harmful effects of anticompetitive conduct.[258] Accordingly, we will apply the Commission's general competition policies to spectrum manager leasing arrangements.

117. Specifically, the cellular cross-interest rule and associated policies will be applied to spectrum leasing arrangements involving cellular authorizations in Rural Service Areas (RSAs).[259] Thus, a cellular licensee in an RSA (or any entity with an attributable interest in such a licensee, as defined by section 22.942 of our rules[260]) would not be permitted to enter into a spectrum lease involving the other cellular spectrum block to the extent the spectrum lessee would have the authority to make decisions or otherwise engage in activities that determine or significantly influence the nature and types of services provided using the leased spectrum, the terms upon which those services are offered, or the prices charged.[261] For leases meeting these tests, the cellular spectrum is attributable to the spectrum lessee for purposes of applying section 22.942.

118. In addition, we retain the discretion to consider the use of leased spectrum by a lessee to provide facilities-based commercial mobile radio services as a relevant factor when assessing CMRS marketplace competition in transactions involving either the licensee or the spectrum lessee. As we indicated when we eliminated the CMRS spectrum cap, the Commission now evaluates competitive effects of CMRS spectrum aggregation on a case-by-case basis.[262] In those circumstances where information on potential competitive harm comes to our attention or where serious allegations of

---

licensee may, as part of its requisite showing, submit materials representing that the activities of its lessees are being relied upon to meet some or all of the performance or buildout conditions placed on the licensee. *See, e.g.*, 47 C.F.R. § 24.203 (construction requirements for broadband PCS).

[258] *See generally 2000 Biennial Review Order on CMRS Aggregation Limits*, 16 FCC Rcd at 22681-22693 ¶¶ 30-46, 22695-22696 ¶¶ 54-55, 22699-22700 ¶¶ 62-65, 22708-22710 ¶¶ 88-92 (discussing the Commission's continuing obligation to guard against anticompetitive effects that might result from entities aggregating certain control over spectrum, as well as the Commission's retention of the cellular cross-interest rule in Rural Service Areas); *see also Policy Statement* at ¶ 24 (Commission should seek to ensure competition in services when implementing secondary market initiatives); In the Matter of Echostar Communications Corporation, *Hearing Designation Order*, 17 FCC Rcd 20559, 20598-20603 ¶¶ 88-96 (2002) (general discussion of Commission's long-standing policy of promoting competition in the delivery of spectrum-based communications, including both wireless radio services and satellite-based services, as well as application of competitive analysis to a proposed merger). We also note that several commenters indicated that spectrum leasing potentially raises anticompetitive concerns. *See, e.g.*, 37 Concerned Economists Comments at 5-6 (in promoting secondary markets in spectrum usage rights, the Commission should remain concerned about possible anticompetitive effects); Macquarie Bank Reply Comments at 12.

[259] *See* 47 C.F.R. § 22.942; *see also 2000 Biennial Review Order on CMRS Aggregation Limits*, 16 FCC Rcd at 22708-22710 ¶¶ 88-92.

[260] *See* 47 C.F.R. § 22.942.

[261] *See id.*; *see also 2000 Biennial Review Order on CMRS Aggregation Limits*, 16 FCC Rcd at 22708-22710 ¶¶ 88-92. We note that the Commission's retention of the cellular cross-interest rule currently is subject to petitions for reconsideration. *See* Cingular Wireless LLC Petition for Reconsideration, WT Docket No. 01-14 (filed Feb. 13, 2002); Dobson Communications Corporation, Western Wireless Corporation, and Rural Cellular Corporation Petition for Reconsideration, WT Docket No. 01-14 (filed Feb. 13, 2002).

[262] *See generally 2000 Biennial Review Order on CMRS Aggregation Limits*, 16 FCC Rcd at 22693-22700 ¶¶ 49-65.

substantial competitive harm are made, we must determine, based on a case-by-case review of all relevant factors, whether services provided over both leased and licensed spectrum in specific product and geographic markets should be taken into account. Thus, the presence of a spectrum lease or other arrangement between or among CMRS providers may be attributable.

119. Although we anticipate that most leasing arrangements will serve to enhance competition, including the entry of new facilities-based competitors, we must nonetheless ensure that leasing does not enable harmful anticompetitive conduct. Because spectrum manager leases require only notification to the Commission, it is important that parties to such leases provide certain basic information to the Commission and the marketplace regarding any potential impact of the lease on facilities-based competition. At the same time, it is important that any such disclosure requirements not be so burdensome that they would discourage parties from using the spectrum leasing model to negotiate spectrum access arrangements that pose no competitive threat. To balance these interests, we will require, as part of the spectrum manager lease notification process, that certain lessees provide necessary certifications relating to these policies. Specifically, if the lease involves spectrum in the cellular services in Rural Service Areas, spectrum lessees must certify that the leasing arrangements do not violate the cellular cross-interest rules. In addition, spectrum lessees leasing CMRS spectrum[263] must disclose to the Commission whether they hold direct or indirect interests (of 10 percent or more)[264] in any entity that already has access to 10 MHz or more of CMRS spectrum (through a license or lease) in the same geographic area. We will also require these leasing parties to indicate whether the lease arrangement reduces the number of CMRS competitors in the market. Such disclosure requirements will help to ensure market transparency, and will also help the Commission to distinguish those leases that may warrant further inquiry to assess whether there is a competitive impact from the likely vast majority of leases that will have no competitive impact and require no further inquiry.[265]

120. *Regulatory classification.* We determine that for those license authorizations under which licensees have the opportunity to choose whether to operate as and be regulated under a CMRS/common carrier or a PMRS/non-common carrier structure (or both), spectrum lessees will also be entitled, to the same extent, to select their own regulatory status.[266] In the case of a service in which the regulatory status of licensees is prescribed by rule, the lessee will be presumed to be bound by the status set forth in the rules and applied to the licensee. Under this type of spectrum leasing, to the extent that a spectrum lessee

[263] For these purposes, CMRS spectrum includes cellular, broadband PCS, and SMR spectrum regulated as CMRS.

[264] For the purpose of implementing this requirement, we define these direct or indirect interests in the same manner as defined pursuant to existing rules for wireless licensees under Part 1. In particular, a lessee must disclose whether it has a 10 percent direct or indirect interest in an entity, as defined in Section 1.2112 of our rules. *See* 47 C.F.R. § 1.2112; *see also* 47 C.F.R. §§ 1.919 (ownership information relating to Wireless Radio Service licensees and applicants); 1.948 (ownership reporting requirements for transfers and assignments).

[265] In the Further Notice, we inquire whether we can adjust upon this specific disclosure requirement, consistent with meeting our public interest obligation to guard against anticompetitive behavior. *See* Section V.B.2.a(i), *infra.*

[266] For example, in PCS, licensees are presumed to be providing CMRS over licensed frequencies, but are entitled to make a showing that such presumption is incorrect and to receive designation as a PMRS operator. *See* 47 C.F.R. § 20.9(b)(1) (permitting PCS licensee operating on a commercial mobile radio service basis to operate portions of the licensed spectrum on a private mobile radio service basis). Similarly, the LMDS rules provide significant flexibility in allowing a licensee to use its spectrum for CMRS, PMRS, or both. *See* 47 C.F.R. § 101.1013.

seeks to operate under a different regulatory status than the licensee or the service, the lessee will be responsible for meeting the obligations relating to its choice.[267]

121. *Various other rules, including certain statutory obligations.* Under spectrum manager leasing, spectrum lessees will be subject to other statutory and related regulatory requirements – including Title II obligations or other requirements, such as those relating to the Communications Assistance for Law Enforcement Act (CALEA),[268] Equal Employment Opportunity (EEO),[269] Telecommunications Relay Service (TRS),[270] North American Numbering Plan (NANP),[271] universal service funds,[272] and regulatory fee payment obligations[273] – depending upon the nature of their operations on the leased spectrum and the terms of the applicable statutory and/or regulatory provisions. These regulatory requirements are generally applied to entities based on the type of service they provide without regard to their status as a licensee or a lessee. For instance, such provisions may apply to common carriers[274] or telecommunications carriers[275] as defined under the Communications Act. Thus, if a lessee is operating as a common carrier, it will be subject to Sections 201 and 202 of the Communications Act of 1934, as amended, and the related obligations attendant to being a provider of wireless services on a common carrier basis. The applicability of these types of provisions will be independent of an entity's status as licensee or spectrum lessee.

122. While the rules and statutory requirements cited above apply to lessees as well as licensees based on the provision of service, we note that our E911 requirements expressly apply only to "licensees" instead of particular services.[276] Thus, a spectrum lessee who provides facilities-based service does not

[267] *See, e.g.*, 47 C.F.R. §§ 20.9(b)(1), 101.1013.

[268] *See generally* 47 U.S.C. §§ 229, 1001 *et seq.*; 47 C.F.R. Part 64, Subparts V and W.

[269] *See, e.g.*, 47 C.F.R. §§ 1.815, 22.321.

[270] *See generally* 47 U.S.C. § 225; 47 C.F.R. Part 64, Subpart F.

[271] *See generally* 47 U.S.C. § 251(e); 47 C.F.R. Part 52.

[272] *See generally* 47 U.S.C. § 254; 47 C.F.R. §§ 54.706, 54.709.

[273] *See generally* 47 U.S.C. § 159; 47 C.F.R. Part 1, Subpart G. We note that while Section 9 of the Communications Act, 47 U.S.C. § 159, which prescribes the Commission's authority and obligation to collect regulatory fees, does not use the term "licensee" or "carrier" or any similar nomenclature, our orders prescribing regulatory fee amounts have used the term "licensee" when identifying the CMRS and other entities liable for payment of such regulatory fees. *See, e.g.*, In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2003, *Report and Order*, 18 FCC Rcd 6805 (2003). Under this regulatory option for spectrum leases, licensees will remain responsible for payment of the small fees paid in advance of their license term (*e.g.*, land mobile, rural radio). *See* 47 C.F.R. § 1.1152. We note that these "small fees" are generally assessed on a "per license" basis. Where regulatory fees are paid annually on a per-unit basis (*e.g.*, CMRS services), we will require that licensees and lessees separately pay fees for those units to which they provide service or for which they otherwise are responsible. For example, if a CMRS licensee has 10,000 units in operation and a lessee has 1,500 units in operation, they would each be required to pay the associated annual, per-unit charge.

[274] *See, e.g.*, 47 U.S.C. § 225(c) (provision of telecommunications relay services); 47 U.S.C. § 229 (Communications Assistance for Law Enforcement Act compliance).

[275] *See, e.g.*, 47 U.S.C. § 251 (interconnection, numbering, and related obligations); 47 U.S.C. § 254 (universal service obligations; also uses the reference "providers of telecommunications services"); 47 U.S.C. § 255 (access by persons with disabilities; uses the term "provider of telecommunications service"); 47 U.S.C. § 1002 (CALEA assistance capability requirements).

[276] *See, e.g.*, 47 C.F.R. § 20.18.

come within the literal scope of the E911 rule. Because we do not intend that spectrum leasing be used as a means of circumventing the underlying purposes of our service rule and policies, including our E911 rules, licensees retain their E911 obligations with respect to leased spectrum. Accordingly, to the extent that a spectrum manager leasing arrangement involves a lessee providing CMRS services, the licensee must continue to ensure that the E911 obligations are being met, whether by the licensee or its lessee.[277]

(c) Notification

123. For spectrum manager leasing, we will require that licensees provide notification to the Commission that they have entered into this type of spectrum leasing arrangement. This notification must be submitted in advance of operation, as discussed below, and failure to notify the Commission prior to operation would constitute a substantive rule violation subject to enforcement action. This notification, which is designed not to be onerous, provides us with useful information about spectrum usage and helps us to ensure that licensees and lessees are complying with our interference and non-interference related policies and rules.[278]

124. *Notification requirements.* Licensees must report these leases to the Commission within 14 days of execution, and at least 21 days in advance of operation. Licensees will be required to submit the following information on each spectrum lease to the Commission through ULS:[279] (1) necessary information on the identity of the spectrum lessee (including necessary contact information) and its eligibility to lease spectrum; (2) the specific spectrum leased (in terms of amount, frequency, and geographic area involved), including the call sign affected by the lease; (3) the term of the lease; and (4) other information required pursuant to the policies applicable to these leasing arrangements (*e.g.*, foreign ownership and other certifications), as discussed above.[280] This notification will contain information similar to that submitted currently on our Form 603.[281] Such submission will be placed on an informational public notice on a weekly basis, unless the license involved is not subject to prior public notice requirements.[282] We include an advance notification requirement so as to allow the Commission and the public some opportunity to review the leasing arrangement prior to operation. While we will not usually require the lease parties to file a copy of the lease agreement with the notification, parties must maintain copies of the lease as well as any authorization issued by the Commission, and make them available for inspection upon request by the Commission or its representatives. For spectrum manager leasing arrangements of one year or less, licensees must provide notice at least ten days in advance of

[277] *See id.* We note that the Commission currently is inquiring whether the E911 rules, which are expressly applicable only to licensees, should also be applied to non-licensees such as resellers. *See* Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems, *Further Notice of Proposed Rulemaking*, 17 FCC Rcd 25576, 25609-25611 ¶¶ 92-97 (2002) (*E911 Scope Proceeding*). We may ultimately decide at a later time to transfer the record developed on this issue to the *E911 Scope Proceeding*.

[278] *See Policy Statement* at ¶ 24 (while seeking to promote the ability of licensees to freely trade their spectrum usage rights in secondary markets, the Commission should also maintain sufficient administrative control and authority to safeguard the interests of the public).

[279] To the extent that a licensee seeking to file a spectrum manager leasing notification falls within the provisions of section 1.911(d) of our rules, 47 C.F.R. § 1.911(d), it may file the notification either electronically or manually. In addition, there will be no filing fee associated with the filing of spectrum manager leasing notifications.

[280] *See* Section IV.A.5.a(ii)(b), *supra*.

[281] This new information collection is subject to review and approval by the Office of Management and Budget.

[282] *See* 47 C.F.R. §§ 1.933(c), (d).

operation. In all other respects, the rules generally applicable to spectrum manager leasing arrangements, as enunciated above, apply to these shorter-term arrangements.

125. *Commission authority to investigate and terminate the lease.* The Commission retains the ability to investigate and terminate any spectrum leasing arrangement to the extent it determines, post-notification, that the arrangement constitutes an unauthorized transfer of *de facto* control under our new standard or raises foreign ownership, competitive, or other public interest concerns. We will closely monitor leasing information and activity to ensure that licensees and lessees do not use this leasing option as a means of thwarting or abusing the Act or applicable Commission policies and rules (*e.g.*, the basic qualifications and rules applicable to licensees). Commission review of a spectrum lease implemented under this option might be initiated if information were to come to the attention of our staff – through the notification process or other sources (*e.g.*, news reports or press releases) – that suggested a potential problem with the lease under the applicable rules and policies. Alternatively, interested parties might seek informal guidance or a formal determination from the Commission regarding a particular lease arrangement by means of a letter to the Commission, a petition, or a complaint. Such processes are no different from current practices before the Commission where an entity may provide information to the Commission staff and pose questions about the permissibility of, for example, the terms and practices of the parties under a management agreement or other business transaction. We believe that these processes will ensure that we are able to terminate a leasing arrangement under this option where warranted in fulfillment of our statutory and public interest obligations.

b. "*De facto* transfer" leasing – Spectrum leasing arrangements that involve transfers of *de facto* control under Section 310(d)

126. In this section, we provide licensees and spectrum lessees with an alternative model for spectrum leasing – one in which licensees can delegate *de facto* control of the leased spectrum and associated legal responsibilities to their spectrum lessees. Under this "*de facto* transfer" leasing, we include two general categories for this type of spectrum leasing: (1) "long-term" leasing arrangements (*i.e.*, leases with individual or combined terms of longer than 360 days); and (2) "short-term" leasing arrangements (leases of 360 days or less). Although these leasing arrangements involve transfers of *de facto* control under Section 310(d) that necessitate Commission approval, we adopt significantly streamlined procedures to minimize the regulatory burdens and transaction costs imposed on parties entering into these arrangements.

(i) Long-term *de facto* transfer spectrum leasing arrangements

(a) Background

127. As noted above, as an alternative to the approach advanced in the *NPRM*, the Commission inquired whether it should permit licensees and spectrum lessees to enter into arrangements in which the lessee, instead of the licensee, would be held directly responsible for compliance with Commission policies and rules.[283] The Commission recognized that, even under a revised standard, certain types of spectrum leasing arrangements might constitute a transfer of *de facto* control under Section 310(d).[284]

128. The Commission also sought comment on its role in ensuring enforcement of the Act and Commission policies and rules under any alternative vision of spectrum leasing.[285] In addition, it

[283] *NPRM* at ¶ 29.

[284] *See id.* at ¶¶ 78-81.

[285] *See id.* at ¶¶ 81-82.

requested comment on the notification and/or procedures it should adopt. It proposed to consider permitting licensees and lessees to enter into such arrangements pursuant to some form of authorization, such as a blanket determination, in which the Commission would approve arrangements that met certain conditions.[286] Finally, to the extent that commenters thought that leasing arrangements might constitute transfers of *de facto* control under Section 310(d), the Commission proposed considering whether forbearance would be an appropriate approach to take.[287]

129. As we discussed above, many commenters expressed significant concern that the leasing model set forth in the *NPRM* was not sufficiently flexible with regard to the nature of the respective responsibilities of licensees and spectrum lessees. Specifically, several of these commenters – licensees and potential spectrum lessees alike – indicated that licensees would not be interested in exercising extensive or direct oversight over their spectrum lessees' activities and they opposed requiring licensees to act with due diligence regarding their lessees' compliance with the applicable service rules.[288]

130. Many commenters were concerned that licensees would not lease spectrum if their lessees' non-compliance could threaten the licensees' ability to hold the license.[289] In addition, many contended that the Commission's proposal to hold licensees directly responsible for their lessees' compliance with Commission policies and rules could actually impede the development of secondary markets.[290]

---

[286] *See id.* at ¶ 81.

[287] *See id.* at ¶ 82.

[288] *See, e.g.*, AT&T Wireless Comments at 10 (Commission should not require licensees to verify their lessees' compliance); Blooston Rural Carriers Comments at 6-7 (Commission should not impose onerous due diligence requirements on licensees so long as lessees have included an appropriate regulatory compliance certification as part of their lease agreement and lessees are aware of Commission's jurisdiction over its use of the spectrum); Cook Inlet Comments at 5-7 (it is unreasonable to require each licensee to act as a regulator to ensure not only current but continued compliance by its lessees with the Commission's rules; for small businesses, in particular, a due diligence obligation would be prohibitively expensive, and risk of potential fine or forfeiture so great that entrepreneur licensees would be discouraged from full participation in the secondary market if a licensee Pacific Wireless Comments at 5 (Commission should not require licensees to verify their lessees' compliance); Securicor Comments at 10-11; process would be difficult to enforce and may take time and resources away from normal Commission activities); Winstar Comments at 7 (holding licensees "ultimately responsible" for their lessees' actions would impose an obligation on licensees to engage in on-going due diligence activities to ensure that lessees are in compliance and would defeat goals of secondary markets proceeding).

[289] *See, e.g.*, CTIA Comments at 8-9 (if licensees must guarantee their lessees' compliance, licensees would be reluctant to lease spectrum at all); Cook Inlet Comments at 4-7 (imposing risk on licensee that it may lose its license because of lessee activities about which licensee has no knowledge will stall the development of secondary markets); El Paso Global Comments at 5-7 (it is unreasonable to penalize licensee for lessee's violation of which it has no prior knowledge and or reasonable opportunity to try to cure; such a strict liability standard would make costs of entering leasing relationships too high); RTG Comments at 13-16 (licensees should not be responsible for the bad acts of their lessees unless they participate in those acts or have actual knowledge of them; making licensees guarantors of their lessees' behavior would undermine licensees' willingness to lease their excess spectrum).

[290] *See, e.g.*, Blooston Rural Carriers at 6 (opposing requirement that licensee be held primarily liable for acts of its lessees; licensee should only be held "secondarily liable"); Cingular Wireless Reply Comments at 2-4 (licensees should only be held "secondarily" liable for their lessees' compliance, not primarily responsible; licensees would be unlikely to lease spectrum if they could not be insulated from direct responsibility for their lessees' non-compliance); CTIA Comments at 4, 8-11, 14-15 (objecting to proposed *de facto* control standard as too restrictive, failing to provide licensees with sufficient flexibility to structure marketable lease arrangements; Commission's approach in holding licensee responsible for their lessees' compliance, which could result in licensee forfeitures and even license revocation, is not feasible and would discourage parties from entering into (continued....)

131. The commenters also stated that spectrum lessees, the entities that would actually be using the spectrum, should be deemed primarily responsible since those entities, not licensees, would have the requisite knowledge about the operational use of the spectrum.[291] Consistent with this line of thinking, a number of these commenters contended that the Commission should proceed directly against spectrum lessees for any possible violations.[292] Several commenters advocating this approach to leasing indicated that it was essential that the Commission, in exercising its spectrum management functions, have the ability to take direct and swift action against spectrum lessees to enforce its interference or other service rules.[293]

---

spectrum leases; the licensee should generally be able to rely on its lessees to comply, and the Commission should hold the lessees, as operators of the spectrum, responsible for immediate compliance); El Paso Global Comments at 5-7 (Commission would undermine operation of the market if it enforces its rules against licensees when, instead, the spectrum lessees, as users of the spectrum, are clearly in the best position to avoid violations); Enron Comments at 19-20 (in order to participate in a secondary market, both licensee and any transmitting users would require assurances from Commission that failure of the other to comply with FCC regulations will not threaten their continued use of the spectrum); NTCA Comments at 4-6 (license holders should not be held directly accountable for acts of lessees if Commission seriously seeks to develop active and robust secondary market; if FCC intends to only hold the license holder liable, large licensees will not lease their fallow spectrum to smaller entities); RTG Comments at 13-16 (Commission's "draconian approach" would "snuff out" incentives that licensees may have to lease unused spectrum; licensees simply cannot be held to account for acts of its lessees if Commission seeks to promote a vibrant secondary market); Winstar Comments at 3, 6-9, 11 (opposing *NPRM* proposal that would hold licensee's directly accountable for their lessees' compliance; Commission would diminish licensees' incentives to lease spectrum to third parties unless it determines to hold spectrum lessees directly responsible for compliance). *Cf.* UTStarcom Comments at 3 (licensees should be able to delegate compliance obligations to their spectrum lessees).

[291] *See, e.g.*, Blooston Rural Carriers Comments at 6-7 (Commission should clarify that licensee's liability for a spectrum user's regulatory compliance is only "secondary"; licensee should be protected from liability for lessees' violations if it includes certain express covenants in lease agreements); Cingular Wireless Reply Comments at 3-4 (Commission should hold spectrum lessees primarily responsible for compliance with FCC rules); CTIA Comments at 8-11 (Commission should make responsibility for compliance with its rules dependent on which entity is actually operating the transmission facilities on the spectrum); El Paso Global at 5-7 (as between the spectrum lessee, the actual user of spectrum rights, and non-using licensee, the lessee clearly is in best position to avoid violations of Commission rules); RTG Comments at 2-3, 13-16 (Commission should place primary responsibility for compliance with its rules and regulations not on the licensee, but on the spectrum lessee, the beneficiary and operator of the spectrum; proper apportioning of compliance responsibilities – with rights and obligations placed on actual spectrum user – creates proper incentive structure for licensees to lease spectrum usage rights to independent entities in secondary markets); Winstar Comments at 6 (Commission should hold long-term spectrum lessee that operates the radio equipment responsible for compliance). *Cf.* AT&T Wireless Comments at 13 (licensee should be able to rely on spectrum lessee's certification that it is complying with FCC rules); Pacific Wireless Comments at 3, 5-6 (same); Securicor Comments at 15-16 (same); Teligent Comments at 4-5, 7-8 (same). *But see* Cinergy Comments at 5 (stating that licensees and lessees should be "equally responsible" for compliance, with little discussion); Entergy Comments at 5 (same); Kansas City Power Comments at 5 (same).

[292] *See, e.g.*, Cingular Wireless Reply Comments at 2-3 (Commission should create a regulatory structure in which it can proceed directly against the spectrum lessee for compliance with the rules); Cook Inlet Comments at 5; CTIA Comments at 10-11, 14; RTG Comments at 18-20; Securicor Comments at 9-10; Teligent Comments at 7; UTStarcom Comments at 3; Winstar Comments at 7-8.

[293] *See, e.g.*, Cingular Wireless Reply Comments at 2-3, 5 & n.15, 6 (to eliminate any uncertainty about whether the FCC has requisite authority and ability to proceed directly against spectrum lessees, the Commission could require lessees to be identified in an FCC database); Cook Inlet Comments at 4-6 (if lessee obligations are only addressed in private contracts, Commission might not have necessary regulatory authority over the spectrum lessee to ensure compliance; by requiring spectrum lessee to file leasing notification, Commission can directly (continued....)

132. Several commenters indicated that, to the extent that spectrum leasing was deemed to involve a transfer of *de facto* control under Section 310(d), they would endorse Commission approval through some form of "blanket" approval, conditional licensing, or processing similar to *pro forma* transfer notifications.[294] Also, several concluded that forbearance would be a reasonable approach in the event the Commission determined that spectrum leasing would involve a transfer of control.[295]

(b) Discussion

133. We adopt a second option for spectrum leasing to enable licensees and spectrum lessees to enter into the kind of long-term spectrum leasing arrangements endorsed by many of the commenters. Under this leasing option, referred to as *de facto* transfer leasing, licensees will be permitted to transfer *de facto* control of the leased spectrum to lessees pursuant to streamlined approval procedures as long as the leasing arrangements meet certain conditions, enunciated below.[296] We define these long-term leases as lease arrangements involving transfer of *de facto* control to a spectrum lessee that do not qualify as temporary "short-term" leasing (*i.e.*, leasing of no more than 360 days duration), as discussed in Section IV.A.5.b(ii), below.

134. Comments in this proceeding clearly support the Commission's adoption of a framework for spectrum leasing in which primary and direct responsibility for compliance with the Act and our policies and rules is shifted from licensees to lessees and in which licensees would not be required to exercise ongoing oversight or supervision of their lessees' activities. Facilitating this type of leasing arrangement pursuant to streamlined processing provides licensees and spectrum lessees a sought-after option distinctly different from the first leasing model adopted above, and should further enhance the development of more robust secondary markets in spectrum usage rights.

---

exercise its regulatory authority over lessee); CTIA Comments at 9-11 (FCC rules governing secondary markets must ensure that the entity actually operating the transmission equipment on the spectrum is subject to the Act and other applicable rules, or else spectrum leasing arrangements could introduce serious problems with enforcement in cases where serious violations occur; if the spectrum lessee is actually operating the spectrum, it is not practical, especially in cases of interference protection, to rely on contractual obligations between licensees and lessees to expeditiously deal with rule violations, and the FCC must be able to exercise direct authority over the lessee); Winstar Comments at 7-8 (in order to protect against radio interference, the Commission should have direct jurisdiction over spectrum lessees and the ability to hold them directly responsible for compliance; "the matter is too important to be left entirely to the vagaries of private contract provisions enforced by civil litigation"). *Cf.* Cinergy Comments at 4-5 (flexibility provided by spectrum leasing potentially could lead to decreased compliance as relationship of actual spectrum user to FCC becomes more attenuated; FCC should establish procedures to ensure that any interference disputes are subject to rapid and conclusive resolution); Kansas City Power Comments at 5 (same).

[294] *See, e.g.*, El Paso Global Comments at 12; Pacific Wireless Comments at 7; RTG Comments at 24; Vanu Comments at 8-9.

[295] *See, e.g.*, AT&T Wireless Reply Comments at 8; Cingular Wireless Comments at 10-13; CTIA Comments at 16; El Paso Global Comments at 12; Enron Reply Comments at 4 n.7; RTG Comments at 24; Winstar Comments at 11-12.

[296] In adopting policies and procedures for spectrum leasing arrangements that allow for transfers of *de facto* control to spectrum lessees, while the licensee retains *de jure* control of the license, we are expressly allowing a partial transfer of rights to lessees for the period of the lease. Under these leasing policies, at the end of the term of the lease, the spectrum is returned to the licensee, which thus regains full control of the authorized spectrum. To the extent that there is any apparent conflict with Commission policies concerning so-called reversionary interests, the new policies enunciated in this Report and Order establish that return of *de facto* control of leased spectrum, from the lessee back to the licensee at the end of the lease term, is permissible.

(i) Respective rights and responsibilities of licensees and spectrum lessees

135. *Licensees' rights and responsibilities.* Under this leasing option, licensees may lease any or all of their spectrum usage rights pursuant to spectrum lease arrangements in which they retain *de jure* control of their licenses but transfer *de facto* control of leased spectrum, and associated responsibilities, to spectrum lessees. Under these *de facto* transfer leases, licensees are not required to exercise the kind of operational oversight over the leased spectrum and the lessee that is prescribed for licensees with regard to spectrum manager leasing (which requires no Commission approval) discussed in Section IV.A.5.a, above. We thus relieve licensees of primary and direct responsibility for ensuring that their lessees' operations comply with Commission policies and rules.

136. While licensees are relieved of many responsibilities under this leasing option, they nonetheless retain some residual responsibilities regarding the leased spectrum. The lease does not involve a complete and permanent transfer of control, and the licensee retains *de jure* control of the license as well as some degree of actual control, such that it retains some responsibility to the Commission for operations on spectrum encompassed within its license. While we seek to carefully limit this licensee responsibility in order not to impede commercially viable leasing arrangements, licensees who are implementing these leases cannot relinquish all rights and responsibilities of the license authorization to their lessees. Moreover, we think it is appropriate to expect our licensees to exercise an appropriate degree of care when entering into *de facto* transfer leasing arrangements. For instance, if a licensee engages in a sham leasing arrangement with an affiliate in an effort to enable that affiliate to undertake activities that might otherwise put the license at risk if undertaken directly by the licensee, we would subject the licensee to appropriate enforcement action. We will also hold the licensee accountable for its own violations, including those related to its lease arrangement with the lessee. In addition, we find that it may be appropriate to hold the licensee responsible in specific cases for ongoing violations or other egregious behavior on the part of the spectrum lessee about which the licensee has knowledge or should have knowledge. An example of this type of situation might include the case where a licensee allows a lessee to continue to operate on the leased spectrum despite a Commission order that the lessee cease operations.

137. *Spectrum lessees' rights and responsibilities.* Under *de facto* transfer leasing, the primary responsibility for ensuring compliance with Commission policies and rules is transferred to spectrum lessees. We will hold lessees primarily and directly responsible for complying with the interference, technical, or other service rules (including eligibility requirements) applicable to the licensee pursuant to the Act, the Commission's rules, and the terms of the underlying authorization. We determine that, under the procedures we adopt herein, spectrum lessees will be granted an instrument of authorization that brings them within the scope of our direct forfeiture procedures under Section 503(b) of the Act.[297] Lessees will assume responsibility for interacting with the Commission regarding the leased spectrum, and making all related filings.[298]

138. If there is a question about interference or other technical performance issues, the Commission's Enforcement Bureau will first approach the authorized spectrum lessee, and the lessee will be expected to bring its operations into compliance with the Commission's requirements.[299] To the extent

[297] *See* 47 U.S.C. § 503(b). Accordingly, the citation provision in Section 503(b)(5) of the Act would not apply. *See* 47 U.S.C. § 503(b)(5).

[298] Such filings will be subject to the applicable application fees under 47 C.F.R. § 1.1102 to the same extent as if a licensee were making the same filing.

[299] If and when necessary, the Commission will also approach the licensee to assist in resolving such issues.

that spectrum lessees violate the Communications Act, Commission rules, a Commission order, or a term or condition of an authorization, they will be subject to monetary forfeitures pursuant to Section 503(b)(1) in the same manner as any other person holding an authorization.[300]

139. *Subleasing.* We conclude that permitting subleasing for long-term *de facto* transfer leases will afford parties additional flexibility in their business arrangements. We thus will permit spectrum lessees under long-term leasing arrangements to sublease spectrum, provided certain conditions are met. Specifically, parties entering into a sublease will be required to comply with the Commission's rules for obtaining approval for leasing arrangements and will be governed by those same policies.[301] As with spectrum manager leasing arrangements, licensees may seek to protect themselves from the risks associated with subleasing arrangements by including provisions in their leases that prohibit the spectrum lessee from entering into a sublease.

140. Where a sublease has been approved by the Commission, the sublessee will become the party primarily responsible for compliance with Commission rules and policies, although the lessee and licensee will continue to have some responsibility to the Commission for their actions as well as those of the sublessee. In addition, when the parties to a sublease file their application with the Commission, they must include written consent from the licensee to the proposed sublease. This will ensure that the licensee is aware of the sublease and the role of the new sublessee in operating on frequencies covered by the licensee's license.

141. *Renewal.* A licensee and spectrum lessee that have entered into a spectrum leasing arrangement whose term continues to the end of the current term of the license authorization may, contingent on the Commission's grant of the license renewal, extend the spectrum leasing arrangement during the term of the renewed license authorization. The licensee must notify the Commission of such an extension of the spectrum leasing arrangement on the same application it submits for license renewal. The spectrum lessee may operate under the extended term, without further action by the Commission, until such time as the Commission shall make a final determination with respect to the extension of the spectrum leasing arrangement.

(ii) Application of particular service rules and policies

142. *Interference-related service rules.* As with all other forms of spectrum leasing discussed in this Report and Order, spectrum lessees must comply with all of the interference rules applicable to licensees under the license authorization. Under this type of leasing arrangement, however, as distinct from spectrum manager leasing above, spectrum lessees are primarily responsible for complying with these rules, including responsibility for resolving all interference disputes and complying with safety guidelines relating to radiofrequency radiation.

143. *Eligibility policies and rules.* Spectrum lessees under this *de facto* transfer leasing option must meet the same eligibility and qualification restrictions (including character qualifications) that are

[300] These long-term *de facto* transfer spectrum lessees, as holders of a form of "authorization" under our approach, will be subject to other types of enforcement action including, but not limited to, admonishments, notices of violations (NOVs), cease and desist orders, and revocation. *See, e.g.*, 47 C.F.R. § 1.89. Such spectrum lessees will also be required to respond to any letters of inquiry issued by the Commission, and failure to respond may subject a lessee to possible enforcement action. Interested parties will be able to file a formal or informal complaint against spectrum lessees that are common carriers, as specified in our rules. *See* 47 U.S.C. § 208; 47 C.F.R. §§ 1.711-1.736.

[301] As a result, the discussion of the spectrum lessee's rights and responsibilities in this Section addressing long-term leases involving a transfer of *de facto* control, as well as the discussion of the applicability of particular policies and rules, also applies generally to sublessees.

applicable to licensees under their license authorization. These include general eligibility restrictions placed on the licensees under their authorizations, such as foreign ownership limitations.[302] As with spectrum manager leasing, they also include qualification restrictions. The lessee must not be a person subject to denial of Federal benefits under the Anti-Drug Abuse Act of 1988, and must certify whether it is a person who has been convicted of a felony, had a license revoked for any reason (*e.g.*, misrepresentation or lack of candor), or been convicted of unlawful monopolization.[303]

144. *Use restrictions.* Spectrum lessees entering into *de facto* transfer leasing arrangements must comply with the use restrictions that the Commission has imposed with respect to particular services and authorizations, as with spectrum manager leasing discussed above.[304]

145. *Designated entity/entrepreneur policies and rules.* Under this *de facto* transfer leasing option, designated entity and entrepreneur licensees may enter into leasing arrangements with any entity under the streamlined processing procedures described below,[305] subject to any applicable transfer restrictions[306] and/or any applicable unjust enrichment payment obligations.[307] For example, under this option, a licensee holding a C or F block broadband PCS license won in closed bidding may, during the first five years of the license's initial term, enter into a spectrum leasing arrangement with a non-eligible entity only if the licensee's five-year construction requirement has already been met.[308] A licensee paying for a license under the Commission's installment payment program may enter into a long-term leasing arrangement for that license without triggering unjust enrichment obligations, provided that the lessee would qualify for installment payments under terms as favorable as the licensee's. However, nothing in a spectrum leasing agreement can modify the licensee's sole responsibility for its debt obligation to the government, pursuant to the Commission's rules and any applicable notes and security agreements. A licensee using installment payment financing that seeks to enter into a spectrum leasing arrangement with a lessee that would not qualify for an installment loan under terms as favorable as the licensee's must make full payment of the remaining unpaid principal and must pay any interest accrued through the effective date of the lease.[309] Small business bidding credit unjust enrichment payments will be required

---

[302] *See* 47 U.S.C. §§ 310(a), (b).

[303] *See* Section IV.A.5.a(ii)(b), *supra.*

[304] *See id.*

[305] As discussed below, under the streamlined approval procedures for long-term *de facto* leases, the Wireless Telecommunications Bureau may "offline" a lease application should the Bureau encounter an issue, such as an entrepreneur or designated entity eligibility issue, that cannot be resolved within the abbreviated time frame for streamlined processing. *See* Section IV.A.5.b(iii), *infra.*

[306] *See, e.g.*, 47 C.F.R. § 24.839 (prohibiting with certain exceptions assignments or transfers of control of C or F block broadband PCS licenses won in closed bidding to non-entrepreneurs during the first five years of the license term). *See also C/F Block Sixth Report and Order*, 15 FCC Rcd at 16289-91 ¶¶ 48-52 (permitting assignments or transfers of control to non-entrepreneurs during the first five years of the license terms of C or F block broadband PCS licenses won in closed bidding provided that the licensee has met its five-year construction requirement).

[307] *See* 47 C.F.R. §§ 1.2111, 24.714(c).

[308] *See C/F Block Sixth Report and Order*, 15 FCC Rcd at 16289-91 ¶¶ 48-52; 47 C.F.R. §§ 24.203, 24.839(a)(6).

[309] *See* 47 C.F.R. § 1.2111(c). This requirement applies regardless of whether the licensee is leasing all or a portion of its bandwidth and/or license area.

and calculated as they would if the license were being assigned or transferred.[310] Accordingly, we will require each licensee applying to the Commission to enter into a long-term *de facto* transfer leasing arrangement to certify whether or not the license is subject to entrepreneur transfer restrictions[311] or unjust enrichment obligations.[312] In addition, we will require each licensee applying to the Commission to enter into a long-term *de facto* transfer leasing arrangement involving a license still subject to the installment payment program, and its proposed lessee, to execute the Commission-approved financing documentation in accordance with the requirements discussed *infra* at paragraphs 188 and 189.

146. *Construction/performance requirements.* We will allow licensees using this leasing option to rely on the activities of their spectrum lessees for purposes of complying with the build-out requirements that are conditions of the license authorization. Our policies here are consistent with the general proposal advanced in the *NPRM* and are identical to the approach taken with respect to the spectrum manager leasing option.[313] Because we determine that applicable performance or buildout requirements remain a condition of the license, and cannot be passed on to spectrum lessees even though the activities of the latter may be "counted" for purposes of measuring buildout, the Commission is not imposing any buildout obligations on the spectrum lessee.

147. *Policies and rules relating to competition.* As with spectrum manager leasing, the Commission's policies relating to cellular cross-interest restrictions and promoting facilities-based competition and guarding against the harmful effects of anticompetitive conduct will be applied to long-term *de facto* transfer spectrum leasing arrangements, and we will require that spectrum lessees submit the same certifications relating to competition matters.[314] Attribution of spectrum will necessarily depend upon the actual circumstances of a given lease.

148. *Regulatory classification.* As with spectrum manager leasing arrangements discussed earlier,[315] a spectrum lessee under long-term *de facto* transfer leasing will be entitled to select its own regulatory status, either as a CMRS/common carrier or PMRS/non-common carrier (or both), to the same extent as the licensee would be able to do under the applicable service rules. Under this leasing option, spectrum lessees are the entities responsible for meeting the necessary filing and notification obligations.

---

[310] The amount of any unjust enrichment payment will be determined by the Commission as part of its review of the spectrum lease application under the same rules that apply in the transfer and assignment context. *See* 47 C.F.R. §§ 1.2111, 24.714(c). If the lease covers only part of the license area and/or part of the bandwidth encompassed within the license, the unjust enrichment obligation will be apportioned as though the license were being partitioned and/or disaggregated. *See* 47 C.F.R. §§ 1.2111(e), 24.714(c). We note that a licensee will receive no reduction in its unjust enrichment payment obligation for a lease that ends prior to the end of the fifth year of the license term. We note further that nothing in the rules we adopt herein is intended to eliminate the existing exemption from small business bidding credit unjust enrichment obligations for licenses won in Auctions No. 5 or No. 10. *See C/F Block Sixth Report and Order*, 15 FCC Rcd at 16290-91 ¶ 51.

[311] *See* 47 C.F.R. § 24.709; *see also* 47 C.F.R. § 26.839(a)(6); *C/F Block Sixth Report and Order*, 15 FCC Rcd 16266, 16289-16291 ¶¶ 48-51 (discussing the terms on which the transfer restriction may be lifted early).

[312] *See* 47 C.F.R. §§ 1.2111, 24.714(c). The Commission will not consider requests for reductions in unjust enrichment payment obligations to correspond with terms in leasing arrangements.

[313] *See* Section IV.A.5.a, *supra.*

[314] *See* Section IV.A.5.a(ii)(b), *supra.*

[315] *See id.*

149. *Various other rules, including statutory obligations.* Under this type of leasing, we will subject spectrum lessees to various other statutory and related regulatory requirements – including Title II obligations or other requirements, such as those relating to the Communications Assistance for Law Enforcement Act (CALEA), Equal Employment Opportunity (EEO), Telecommunications Relay Service (TRS), North American Numbering Plan (NANP), universal service funds, and regulatory fee payment obligations[316] – in the same manner as if they were licensees with regard to the leased spectrum. We do so because spectrum lessees gain *de facto* control of the leased spectrum (including associated rights and responsibilities) as well as a form of authorization under this leasing option. Similarly, we will require that long-term *de facto* transfer spectrum lessees that lease spectrum from licensees subject to E911 obligations meet those same obligations.[317] To the extent a licensee or lessee has any uncertainty regarding the applicability of particular statutory or regulatory provisions, it can seek guidance from the Commission.

(iii) Streamlined approval procedures

150. We adopt a set of streamlined procedures to facilitate parties' ability to enter into these long-term *de facto* transfer spectrum leasing arrangements. By adopting these streamlined procedures, we reduce transaction costs, uncertainty, and delay to facilitate spectrum leasing, consistent with our goals in this proceeding, while at the same time ensuring that the Commission fulfills its statutory responsibilities.

151. *Specific approval procedures.* Parties entering into long-term *de facto* transfer leasing arrangements will be required to file an application with the Commission (through ULS)[318] that includes information similar to that submitted currently using Form 603 for transfers and assignments.[319] These spectrum leasing applications will be placed promptly on public notice once the application is sufficiently

[316] As discussed above, while Section 9 of the Communications Act of 1934, as amended, 47 U.S.C. § 159, which prescribes the Commission's authority and obligation to collect regulatory fees, does not use the term "licensee" or "carrier" or any similar nomenclature, our orders prescribing regulatory fee amounts have used the term "licensee" when identifying the CMRS and other entities liable for payment of such regulatory fees. *See, e.g.*, In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2003, *Report and Order*, 18 FCC Rcd 6085 (2003). As with spectrum manager leasing arrangements, licensees leasing spectrum under this leasing option will remain responsible for payment of the small fees paid in advance of their license term (*e.g.*, land mobile, rural radio). *See* 47 C.F.R. § 1.1152. These "small fees" are generally assessed on a "per license" basis. Where regulatory fees are paid annually on a per-unit basis (*e.g.*, CMRS services), we will require that licensees and lessees separately pay fees for those units under their respective control. For example, if a CMRS licensee has 10,000 units in operation and a lessee has 1,500 units in operation, they would each be required to pay the associated annual, per-unit charge.

[317] We will not permit long-term *de facto* transfer leasing to undermine the public safety objectives of the Commission's E911 rules. We note that the Commission has entered into E911 consent decrees with several licensees to ensure that E911 obligations are met. Accordingly, approval of leasing arrangements involving these licensees will be contingent upon the Commission's assessment that such E911 obligations, including those addressed in consent decrees, will not be undermined.

[318] To the extent that a licensee seeking to file a *de facto* transfer leasing application falls within the provisions of section 1.911(d) of our rules, 47 C.F.R. § 1.911(d), it may file the application either electronically or manually. In addition, applicants filing a *de facto* transfer spectrum leasing application will be required to pay a filing fee consistent with a transfer of control application as required by 47 C.F.R. § 1.1102 applicable to the particular service involved. Licensees exempt from application filing fees pursuant to 47 C.F.R. § 1.1114 will not be required to pay a fee in connection with a *de facto* transfer leasing application.

[319] The new information collection requires approval by the Office of Management and Budget.

complete.[320] Petitions to deny filed in accordance with Section 309(d)[321] will be due within 14 days of the initial public notice date. The Wireless Telecommunications Bureau (Bureau) will either affirmatively consent to, deny, or "offline" the application no later than 21 days following the initial public notice listing the spectrum lease application.[322] Under this streamlined process, where there are no issues requiring further review and if no petition to deny, opposition, or other comments concerning the lease application are filed, the consent will be reflected in the first public notice issued after the grant. If, on the other hand, any opposition is submitted, the Bureau will address the arguments raised in an order.[323]

152. If the Bureau determines, based upon its own review or in light of filings by interested parties, that there are issues that cannot be resolved within the abbreviated time frame, it will notify the applicants and remove the application from streamlined processing.[324] For instance, the Bureau could offline an application to the extent it might raise competition concerns or foreign ownership issues that require further examination. If an application is removed from streamlined processing, the Bureau will issue a public notice so indicating. Within 90 days of that public notice, the Bureau will either take action upon the application or provide public notice that an additional 90-day period for review is needed. Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application. In addition, interested parties may seek reversal of a grant by filing a petition for reconsideration or an application for review.

153. *Spectrum leasing applications.* We are streamlining the submission form to minimize the burden on lease applicants while ensuring that we receive the information we need to complete our review of the proposed arrangement and to enforce our interference and other requirements as applicable to the lessee and the licensee. The application must include information about the licensee and the call sign affected by the lease, the identity of the spectrum lessee, the term of the lease, the particular spectrum leased, the geographic area encompassed within the lease, and sufficient information to demonstrate that the lease agreement meets the conditions imposed by the rules we adopt in this Report and Order. While we will not routinely require the lease applicants to submit a copy of the lease agreement with the application, parties must maintain copies of the lease as well as any authorization issued by the Commission, and make them available for inspection by the Commission or its representatives.

154. Following approval of a lease application, the spectrum lessee will be directly and primarily responsible for compliance with Commission rules and policies in the geographic areas and on the frequencies covered by the lease.[325] Through the process of approving the application, the spectrum

---

[320] The Wireless Telecommunications Bureau currently expects to list leasing applications on weekly public notices. Applications involving licenses not subject to prior public notice requirements will not be placed on such public notices. *See* 47 C.F.R. §§ 1.933(c), (d).

[321] *See* 47 U.S.C. §§ 309(b)-(d). Thus, some *de facto* transfer leasing applications will not be subject to petitions to deny.

[322] The filing of a petition to deny will not automatically lead to offlining the application from streamlined processing, although we will need to address the issues raised in any petition to deny.

[323] *See* 47 U.S.C. § 309(d)(2).

[324] To the extent the application fails to include information required by the Bureau to determine that the proposed lease meets our standards, the parties may be requested to provide additional information. This may necessitate removal of the application from streamlined processing to allow for submission and review of such data.

[325] We note, of course, that until such a lease is approved pursuant to these procedures, the licensee remains fully responsible for exercising *de facto* control and for any violations of Commission policies and rules by any third party leasing the spectrum.

lessee will be granted an authorization and will be placed on a par with the licensee in terms of the Commission's ability to take enforcement action pursuant to the Act. The Commission will be able to initiate an enforcement action against parties found to be in violation of Commission rules, including any misrepresentations about the lease, and actual behavior subsequent to the Commission's consent. The spectrum lessee also will become responsible for making any applicable filings, including applications and notifications, submission of any materials required to support a required Environmental Assessment, any reports required by our rules and applicable to the lessee, information necessary to facilitate international or IRAC coordination, or any other submissions applicable to the lessee's operations. In addition, spectrum lessees will be obligated to maintain accurate information on file pursuant to section 1.65 of our rules.[326] To facilitate our recordkeeping as well as access to information necessary to undertake any necessary enforcement inquiries or actions, we will make clear in ULS the relationship among each licensee, its lessees, and their sublessees in order to reflect the associations with the licensee's underlying call sign.

155. *Forbearance from Section 309(b) requirements relating to 30-day notice and comment for common carrier licenses.* Section 309(b) of the Act requires that, if a transfer or assignment of common carrier licenses involves a "substantial change in ownership or control," a 30-day public notice and comment period must be provided.[327] To the extent necessary to permit us to approve spectrum applications involving common carrier or CMRS licenses in less than 30 days pursuant to the procedures discussed above, we forbear from the Section 309(b) 30-day public notice requirement.

156. Under Section 10 of the Act, the Commission may forbear from applying any regulation or provision of the Act to a telecommunications carrier or service, or class of telecommunications carriers or services, in any or some of its geographic markets, if the following three-prong test is satisfied: (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.[328] In determining whether forbearance is consistent with the public interest, the Commission must consider whether forbearance will promote competitive market conditions, including whether it will enhance competition among telecommunications service providers.[329] If the Commission determines that forbearance will promote competition among providers of telecommunications services, that determination may be the basis for finding that forbearance is in the public interest.[330]

157. We conclude, pursuant to the first prong of the test for establishing forbearance, that a 30-day notice and comment period for spectrum leases is not necessary to ensure that a carrier's charges, practices, classifications, and services are just and reasonable, and not unjustly or unreasonably discriminatory. We note that information relevant to these particular determinations are not included in the applications, and that in any event a full 30-day public notice period for spectrum leasing applications

[326] 47 C.F.R. § 1.65.

[327] *See* 47 U.S.C. § 309(c)(2)(B). The 30-day public notice and comment requirement set forth in Section 309(b) does not apply to Private Mobile Radio Service (PMRS) licenses. Accordingly, no forbearance from this requirement is necessary with regard to the many PMRS licenses that also are affected by the leasing procedures adopted in this Report and Order.

[328] 47 U.S.C. § 160(a).

[329] 47 U.S.C. § 160(b).

[330] *Id.*

is not necessary to achieve these objectives. Indeed, since we expect that leasing will promote competition (including facilities-based competition), increase or improve wireless services offered to the public, and otherwise benefit the public interest, we believe that facilitating spectrum leasing in fact will reinforce achievement of these objectives.

158. Similarly, in analyzing the second prong of the Section 10 forbearance standard with respect to the streamlined spectrum leasing procedures, we conclude that requiring a 30-day notice and comment period is not necessary for the protection of consumers. Using these procedures, the Commission will review all applications for spectrum leases and, as noted above, interested parties will continue to have the opportunity to file comments. In the event a particular application raises issues that might have an adverse effect on consumers, the Commission retains the authority, as discussed above, to remove that application from streamlined processing for further review. Forbearance from a 30-day public notice period will not deprive consumers of protection because our procedures allow adequate time for initial Commission review as well as an opportunity for subsequent review if necessary. We also note that the procedures we adopt will make it easier, with less cost and delay, for additional entities to gain access to spectrum so that it may be put to use for the ultimate benefit of consumers.

159. Finally, applying the third prong of the Section 10 forbearance standard, we determine that forbearance from the 30-day comment period required by Section 309(b) is consistent with the public interest. Forbearance will promote competition by allowing parties to lease spectrum without undue regulatory delay. We believe that a 21-day review period will provide adequate time to determine whether a particular application has the potential to harm the public interest. During the 21-day period, we will review all spectrum lease applications and evaluate the public interest implications of the proposed transaction. The efficiency gained by our expedited review process and streamlined procedures will increase carriers' ability to compete in the wireless marketplace, with benefits for consumers, in furtherance of our statutory goals. Such efficiency will promote competitive market conditions, thus enhancing competition among telecommunications service providers.

(ii) Temporary, short-term *de facto* transfer spectrum leasing arrangements

160. We also adopt a separate set of policies and procedures to facilitate the leasing of spectrum usage rights involving a transfer of *de facto* control to meet temporary, short-term needs for spectrum. Because these short-term leasing arrangements are by definition only temporary and raise different and fewer concerns from those associated with long-term leasing arrangements discussed above, we adopt even more expedited approval procedures and permit more flexible leasing policies.

(a) Background

161. As noted above, the Commission sought comment in the *NPRM* on both long-term and short-term spectrum leasing arrangements. The Commission recognized that a potential spectrum user, with a particularized business need, might require access to spectrum usage rights for only a short period of time.[331] The Commission specifically inquired whether there might be good reasons to distinguish between short- and long-term leasing arrangements, and whether some of the service rules applicable to licensees in certain services, such as aggregation limits or unjust enrichment, might not be appropriate for arrangements that were only of very limited duration.[332] At the same time, the Commission expressed

[331] *NPRM* at ¶ 19. *See also Policy Statement* at ¶¶ 12-13; *Public Forum Transcript* at 18.

[332] *NPRM* at ¶¶ 43, 49, 54.

concern that such leasing not be used in a manner that would undermine existing policies and rules requiring that licensees meet applicable construction or substantial service obligations.[333]

162. Although several parties commented briefly on short-term leasing, only a few specifically addressed whether the Commission should distinguish between short-term and long-term leasing arrangements, and if so, how.[334] In particular, a few commenters proposed that the Commission not apply certain service rules to lessees if the lease was for a short period of time.[335] Some commenters requested that the Commission distinguish between short-term and long-term leases for purposes of applying the CMRS spectrum cap, contending that lessees in short-term leases should not be attributed with the leased spectrum.[336] One commenter stated that designated entity licensees entering into short-term leasing arrangements with entities not eligible for the same level of bidding credits should not be required to pay unjust enrichment.[337] Another commenter suggested that the Commission establish a special safe harbor for short-term leasing because such transactions could not withstand high transaction costs or delays, and should not require prior Commission approval. It stated that short-term leasing would allow providers access to spectrum to meet demand during short periods of time in limited areas, such as major conventions or sporting events, without having to acquire extensive spectrum usage rights that would lie idle at other times.[338] A few commenters addressed where to draw the line between long- and short-term leasing, one suggesting that a 60-day lease would constitute a short-term lease, while another proposed that the Commission define "short-term" as a lease of less than three years, and another suggested one year.[339] Finally, one commenter stated that licensees entering into short-term leasing arrangements should not be able to rely on their lessees' activities to meet any applicable buildout requirements.[340]

(b) Discussion

163. We find that the public interest would be served by facilitating short-term *de facto* transfer leasing arrangements that meet entities' temporary needs for access to spectrum. There are legitimate specific needs that can most easily and efficiently be addressed through these kinds of short-term leasing arrangements, and we conclude that the public interest would be served by providing special procedures tailored to enable parties to enter into such arrangements, with minimal costs and delay, that can meet their temporary needs for access to spectrum. Accordingly, with regard to all of the wireless services affected by this Report and Order, we will approve, pursuant to our authority to grant special temporary authority (STA) under Section 309(f) of the Communications Act,[341] short-term *de facto* transfer leasing

[333] *Id.* at ¶ 50.

[334] *See, e.g.*, AT&T Wireless Comments at 7; Cingular Wireless Comments at 4; Cook Inlet Comments at 10; El Paso Global Comments at 4; Macquarie Bank Reply Comments at 6; Pacific Wireless Comments at 4; RTG Comments at 27-28; Teligent Comments at 2; Vanu Comments at 6-7; Winstar Comments at 3, 14-15.

[335] *See, e.g.*, Cook Inlet at 10; RTG Comments at 28 (contending that lessees under short-term leases would not effectively have gained the operational rights and benefits of control of the spectrum usage rights).

[336] *See, e.g.*, CTIA Comments at 8 n.19; RTG Comments at 28; Winstar Comments at 14-15.

[337] *See* Cook Inlet Comments at 12.

[338] *See* Vanu Comments at 6-7.

[339] *See* Cook Inlet Comments at 12 n.19 (suggesting one year); CTIA Comments at 8 n.19 (suggesting 60 days as an example); RTG Comments at 27 (proposing three years).

[340] *See* Cook Inlet Comments at 10.

[341] 47 U.S.C. § 309(f). *See also* 47 C.F.R. § 1.931(a)(2)(iv).

arrangements, for a period of up to 360 days, if they meet the specified conditions discussed below.[342] We believe that in order to permit meaningful, timely short-term arrangements, we must ensure that our processes do not unduly delay the efforts of a licensee and lessee to implement this type of agreed-to business arrangement. Also, by virtue of the temporary nature of these leases, we determine that additional flexibility with respect to certain of the service rules is appropriate, and that we accordingly will not require that short-term spectrum lessees meet all of the regulatory requirements that are applicable to the licensee, as discussed below.

164. We believe that potential spectrum users' needs for near-term, temporary access to spectrum usage rights can best be achieved under our statutory STA authority. Section 309(f) empowers the Commission to grant STA applications if it finds that "there are extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of such temporary operations would seriously prejudice the public interest."[343] Under this authority, the Commission may grant such applications for a period of up to 180 days and may renew the STA for as much as an additional 180 days per renewal.[344] Because of special considerations related to the temporary nature of such leases, and the specific need to minimize costs, uncertainty, and delay when addressing parties' short-term needs for access to spectrum that would benefit the public, we determine that short-term leasing arrangements that meet specific conditions generally warrant grant of an STA. Our findings in this Report and Order support the determination that the temporary operations associated with a short-term lease are in the public interest. Moreover, timely initiation of operations under such a short-term arrangement often is necessary to permit the spectrum lessee to meet service needs. Parties to a short-term lease may rely on the findings contained in this Report and Order, but must still include an individualized statement of why the proposed arrangement meets the public interest requirements of Section 309(f). Consistent with our statutory authority concerning temporary authorizations, we define a short-term lease as a lease agreement with a term of no more than 360 days. To fall within this definition, the lease may have an initial term of up to 180 days, which may be renewed for as much as an additional 180 days. Thus, a short-term lease potentially could have an initial term of 180 days or less, and be renewable one or more times up to a maximum of 360 days.[345]

165. As discussed below, we adopt safeguards to ensure that these special policies and procedures are provided only for temporary arrangements appropriate for the STA process we adopt here. We will not permit parties to convert these temporary arrangements into longer term leases in a manner that would evade the policies we have adopted for long-term arrangements involving a transfer of *de facto* control discussed earlier in this Report and Order.

---

[342] We note that licensees and lessees may enter into short-term leasing arrangements under spectrum manager leasing arrangements as well, so long as the licensee complies with the policies and procedures applicable to that type of leasing arrangement, as discussed in Section IV.A.5.a, above.

[343] 47 U.S.C. § 309(f).

[344] *Id.*

[345] A short-term lease may not exceed 360 days, or the remainder of the licensee's license term, whichever is shorter.

(i) Respective rights and responsibilities of licensees and spectrum lessees

166. *Licensees' and spectrum lessees' rights and responsibilities.* Under these short-term *de facto* transfer leasing arrangements, we will hold the spectrum lessee primarily accountable for compliance with the Commission's rules and policies (which generally will be operational, technical, and interference-based), to the extent they are applicable to the lessee's use of the leased spectrum. The licensee will generally not be directly liable for the acts of its lessee, but will be accountable for its own willful or repeated violations, including those related to its lease arrangement with the lessee. Similarly, both licensees and short-term spectrum lessees will be subject to our jurisdiction and to possible enforcement action for violation of any technical or other rules that are applicable to the license, to the same extent and in the same manner as any other licensee.[346] In addition, we will specifically and individually condition grant of these short-term spectrum leasing applications on the requirement that the spectrum lessee must temporarily suspend, terminate, or modify its operations without a hearing if the Commission or its staff issues an order determining that the lessee is or may be in violation of the Act, a rule, or other term or condition of the authorization.

167. *Enforcement of restrictions on short-term leasing.* As discussed above, the special policies and procedures that we adopt here are intended to be used only for short-term leasing arrangements. Accordingly, we will carefully review filings made by parties, and require appropriate certifications, to ensure that such leasing arrangements do not exceed 360 days. We also note that should we find evidence on our own investigation or have evidence brought to our attention that the parties to a leasing arrangements are attempting to use the short-term leasing procedures for a lease that in fact will exceed 360 days (or the parties reasonably expect the lease to run for longer than 360 days), we will take all appropriate enforcement action against the licensee and lessee, including possible forfeitures, revocation of authority to operate pursuant to the lease, and/or revocation of the underlying license.[347] Among other things, we will guard against the attempted use of affiliates to evade the short-term lease time limit as well as arrangements that seek to undercut fundamental Commission policies in the guise of being a short-term lease.

168. *Extension of leasing beyond 360 days.* We recognize that there may be circumstances in which parties enter into a short-term *de facto* transfer leasing arrangement expecting that the spectrum lessee's needs would not extend beyond 360 days and, at some later time, determine that they would like to maintain the spectrum lease beyond the short-term period. If so, then the parties must submit (in sufficient time prior to the expiration of the STA) the appropriate application under our long-term spectrum leasing procedures, and obtain Commission consent pursuant to those procedures, as described in Section IV.A.5.b(i)(b)(iii) above. With specific regard to designated entity licensees that seek to continue leasing to their spectrum lessees (or to their affiliates or controlling interests, as determined under our "controlling interest" standard[348]) beyond 360 days, we will permit them to convert their arrangements to a long-term lease to the extent that they comply with our long-term leasing procedures and that they pay any unjust enrichment that would have been owed had the parties filed a long-term spectrum leasing application in the first instance.[349]

---

[346] Because consent to an STA constitutes the granting of an authorization, short-term *de facto* transfer leases will be subject to our direct forfeiture authority under Section 503(b).

[347] For example, a licensee would not be permitted to use the short-term procedures for a series of leases to affiliated companies in which the leases had a combined term of more than 360 days.

[348] *See generally* 47 C.F.R. § 1.2110(b)(2).

[349] *See generally* Section IV.A.5.b(i)(b), *supra*.

169. We will not permit parties to effectively convert a short-term lease into a longer term arrangement and, by so doing, undermine or evade the applicable policies and procedures that we have adopted for long-term spectrum leasing arrangements. Accordingly, we will monitor the parties' use of these short-term leasing arrangements to ensure that they are not entering into a series of short-term leasing arrangements or otherwise leasing pursuant to these special policies and procedures as a means to evade policies and procedures (*e.g.*, designated entity and/or entrepreneur rules or use restrictions) applicable to longer *de facto* control leasing arrangements. We also will deny any application to extend a short-term lease into something longer in those situations in which the parties would not have been able, in the first instance, to use the long-term leasing option because of the transfer, use or other restrictions applicable to the particular service.

170. *Subleasing.* In light of the fact that this type of leasing arrangement is designed to be short-term and to meet immediate needs of individual spectrum lessees, we will not permit subleasing under these short-term leasing policies.

171. *Renewal.* So long as the short-term leasing arrangement does not extend beyond a total of 360 days, a licensee and spectrum lessee that have entered into a spectrum leasing arrangement whose term continues to the end of the current term of the license authorization may, contingent on the Commission's grant of the license renewal, extend the spectrum leasing arrangement during the term of the renewed license authorization. The licensee must notify the Commission of such an extension of the spectrum leasing arrangement on the same application it submits for license renewal. The spectrum lessee may operate under the extended term, without further action by the Commission, until such time as the Commission shall make a final determination with respect to the extension of the spectrum leasing arrangement.

(ii) Application of particular service rules and policies

172. We will require that many, but not all, of the service rules applicable to the licensee also apply to spectrum lessees in the context of short-term *de facto* transfer leasing. In particular, we will require that short-term spectrum lessees comply with all of the technical, operational, and interference-related requirements placed on licensees (just as those requirements apply to long-term lessees under the policies adopted herein). However, in order to encourage the use of short-term leasing to meet temporary needs for access to spectrum, we will provide additional flexibility to spectrum lessees by not requiring them to comply with certain of the other service rules applicable to licensees in many services,[350] as discussed below.

173. *Interference-related service rules.* Requiring that short-term spectrum lessees meet the same technical, operational, and interference-related requirements imposed on the licensee will ensure that the activities of a short-term spectrum lessee do not cause interference to other operators.

174. *Eligibility policies and rules.* We will also require, under these policies, that short-term lessees satisfy all statutorily-based eligibility requirements, such as the restrictions on foreign ownership set forth in Section 310 as well as the restrictions associated with the Anti-Drug Abuse Act of 1988. We note that this is consistent with our STA policies and rules.

175. *Use restrictions.* While use restrictions generally will be applied to lessees, we will permit some additional flexibility under short-term *de facto* transfer leasing with regard to one particular set of use restrictions. Specifically, we will permit licensees with service authorizations that restrict use of

[350] We note that the Commission historically has permitted entities to gain temporary access to spectrum through the STA process and to use that spectrum in a manner not specifically authorized under the particular service. *See generally* 47 C.F.R. § 1.931(b)(1).

spectrum to non-commercial uses to enter into short-term leasing arrangements, under these STA procedures, that allow the lessee to use the spectrum commercially. Given that these leases are by definition designed to meet only temporary spectrum needs, and can in no event be extended beyond 360 days under the safeguards we are adopting, we do not believe that permitting this more flexible use by spectrum lessees will undermine the policies underlying the use restrictions of these services.

176. *Designated entity policies and rules.* Similarly, we will provide additional flexibility for short-term *de facto* transfer leases with regard to our designated entity and entrepreneur policies. Specifically, we will not subject licensees entering into short-term leases to designated entity unjust enrichment provisions or entrepreneur transfer restrictions that would be applicable if a designated entity or entrepreneur licensee were to enter into a long-term lease arrangement or transfer or assign its license.[351] Thus, for example, a designated entity may lease spectrum on a short-term basis to a non-designated entity without triggering an unjust enrichment payment. In addition, entrepreneur licensees will not be restricted from entering into short-term leases with non-eligible entities.[352] We find that allowing this degree of flexibility in short-term leasing arrangements serves the public interest by making additional spectrum available for short-term use, and that because of the short-term nature of the leases involved and because of the safeguards we adopt, this approach will not undermine basic policies underlying our designated entity or entrepreneur rules by which licensees buildout their systems and provide spectrum-based services.[353] For instance, as discussed below, we do not permit designated entity and/or entrepreneur licensees to rely on short-term leasing arrangements to meet their buildout obligations. And, as discussed previously, we impose safeguards and restrictions to ensure that licensees and short-term spectrum lessees cannot convert these short-term arrangements into longer term arrangements that circumvent the designated entity or entrepreneur policies applicable to long-term leasing arrangements.

177. *Construction/performance requirements.* Unlike the policies applicable to long-term *de facto* transfer leasing arrangements described above, licensees will not be permitted to rely on the activities of their short-term spectrum lessees when seeking to establish that they have met any applicable construction requirements. As discussed above, these short-term leasing arrangements are expressly designed to be temporary in nature, and therefore cannot be counted to establish that the licensee is meeting the purposes and policies underlying our buildout rules, including the goal of ensuring establishment of service in rural areas.

178. *Policies relating to competition.* We will not extend the Commission's policies concerning competition, discussed earlier,[354] to short-term *de facto* transfer leasing arrangements. Because these short-term leasing arrangements are by definition only temporary, and cannot be extended beyond 360 days (unless the arrangement would qualify under the long-term spectrum leasing policies and procedures discussed above), we conclude that these spectrum leasing arrangements do not raise concerns about the

[351] As is the case in long-term leasing, nothing in a short-term spectrum leasing arrangement can modify the licensee's sole responsibility for its debt obligation to the government to the extent that a licensee participates in the Commission's installment payment program. *See* paragraphs 188-189, *infra*.

[352] As we discuss below, however, entrepreneur licensees (as well as other licensees) will not be able to rely on short-term leasing arrangements to meet any construction requirements. Thus, entrepreneurs will not be able to use short-term leasing as a means to evade any transfer restrictions placed on their licenses.

[353] *See generally* 47 U.S.C. §§ 309(j)(3), (j)(4).

[354] *See* Sections IV.A.5.a(ii)(b), IV.A.5.b(i)(b)(ii), *supra*.

consolidation of control over spectrum that could have the type of unacceptable anticompetitive effects that are contrary to the public interest.[355]

179. *Regulatory classification.* As with both spectrum manager leasing arrangements and long-term *de facto* transfer leasing, a short-term lessee will be entitled to select its own regulatory status, either as a CMRS/common carrier or PMRS/non-common carrier (or both), to the same extent as the licensee would be able to do under the applicable service rules. Under this leasing option, spectrum lessees are the entities responsible for meeting the necessary filing and notification obligations.

180. *Various other rules, including statutory obligations.* As with long-term *de facto* transfer leasing, we will subject short-term spectrum lessees to various other statutory and related regulatory requirements – including Title II obligations or other requirements, such as those relating to CALEA, EEO, TRS, NANP, universal service funds, and regulatory fee payment obligations – in the same manner as if they were licensees with regard to the leased spectrum. To the extent a licensee or lessee has any uncertainty regarding the applicability of particular statutory or regulatory provisions, it can seek guidance from the Commission. However, given the short-term nature of these leasing arrangements, we will not require lessees to comply with E911 requirements to the extent the requirements are placed on licensees.

(iii) STA approval procedures

181. Parties seeking to implement short-term *de facto* transfer leases pursuant to the policies and procedures set forth above will submit their request through ULS[356] containing information similar to that currently provided under Form 603, along with the required showing that the request meets the Section 309(f) standards. The spectrum lessee must certify that it meets the specified conditions so as to qualify for these short-term leasing procedures. The Bureau will then review the application, which will not be placed on public notice,[357] in an expedited fashion, acting on the STA request within ten days if the leasing arrangement meets the specified conditions. The STA, which can be for any term of up to 180 days, will become effective on the date of grant. In the event the parties seek to renew the lease for any period of time, up to another 180 days, they must submit another filing, subject to the same procedures. In no event may the cumulative STA period extend beyond a total of 360 days.[358]

6. Other Miscellaneous Matters Concerning Spectrum Leasing

a. Background

182. Several remaining issues may arise in the context of the spectrum leasing arrangements discussed in this Report and Order. These include issues relating to the extension of spectrum leasing

---

[355] *See generally 2000 Biennial Review Order on CMRS Spectrum Aggregation*, 16 FCC Rcd 22668.

[356] To the extent that a licensee seeking to file a *de facto* transfer leasing application falls within the provisions of section 1.911(d) of our rules, 47 C.F.R. § 1.911(d), it may file the application either electronically or manually. In addition, applicants filing a *de facto* transfer spectrum leasing application will be required to pay a filing fee consistent with a transfer of control application as required by 47 C.F.R. § 1.1102 applicable to the particular service involved. Licensees exempt from application filing fees pursuant to 47 C.F.R. § 1.1114 will not be required to pay a fee in connection with a *de facto* transfer leasing application.

[357] This is consistent with our processing of most requests for STA.

[358] The parties to a short-term lease will be required to maintain a copy of the lease agreement in their records and to make it available to the Commission upon request. Similarly, the lessee must keep a copy of the STA grant in its records, to be provided to Commission personnel when requested.

arrangements for longer duration, expiration or termination of spectrum leases, assignment of spectrum leases, transfers of control involving spectrum lessees, and revocation of a license or of a spectrum lessee's operating authority.

b. Discussion

183. *Expiration or termination of spectrum leases.* For all spectrum leases facilitated under the policies enunciated in this Report and Order, the lease notification (in the case of spectrum manager leasing arrangements) or lease application (in the case of *de facto* transfer leasing arrangements) must set forth the planned termination date for the lease. For spectrum manager leasing arrangements subject only to a notification requirement, no further filing is required at termination unless the lease is terminated by the licensee or by the parties' mutual agreement in advance of the original termination date. In either event, the licensee would be required to file a notification within ten (10) days of the early termination date. For *de facto* transfer leases subject to the streamlined processing rules, our consent to the leasing arrangement proposed in an application will include consent to return the leased spectrum to the licensee at the end of the lease term.[359] This consent will also encompass return of the spectrum to the licensee prior to the lease termination date upon notification (on the applicable form) by the licensee of its unilateral termination of the lease. A similar notification will be required if the parties jointly seek to terminate the lease at an earlier date.[360]

184. *Extension of spectrum leasing arrangements.* Spectrum leasing arrangements entered into under the policies set forth in this Report and Order may be extended beyond the initial term set forth in the lease notification or application. For spectrum manager leasing arrangements, the licensee must notify the Commission of the extension of the arrangement within 14 days of execution of the extension and at least 21 days in advance of operating under the extended term. For long-term *de facto* transfer leasing arrangements, the licensee and spectrum lessee must notify the Commission at least 21 days in advance of operating under the extended term. Finally, for short-term *de facto* transfer leasing arrangements, the parties may extend the short-term arrangement, so long as it would not result in an arrangement exceeding 360 days, by notifying the Commission of the extension at least 10 days in advance of operating under the extended term.[361]

185. *Assignment of leases.* We recognize that circumstances may arise whereby a spectrum lessee may seek to assign the spectrum lease to another entity. With regard to spectrum manager leasing arrangements, we will permit a spectrum lessee to assign a lease to another entity provided that the licensee has agreed to such an assignment, files a notification with us, and is in privity with the lease assignee so that the licensee can act as spectrum manager by exercising *de facto* control over the subleased spectrum. With regard to *de facto* transfer leases, a spectrum lessee may file an application with us, assuming that the proposed arrangement meets the test for streamlined processing, for approval to assign the leasing authorization (or a subset thereof) to a third entity. For this type of leasing, we also require privity between the licensee and the lease assignee. In addition, should there be a *pro forma*

[359] As discussed earlier, to the extent that there is any apparent conflict with extant Commission policies concerning so-called reversionary interests with regard to the Wireless Radio Services affected by this proceeding, the new policies enunciated in this Report and Order establish that reversion of *de facto* control of leased spectrum, from the spectrum lessee back to the licensee at the end of the lease term, is permissible.

[360] We note that the Commission does not intend to become involved in private contractual disputes between the parties, consistent with our usual practice.

[361] As discussed in Section IV.A.5.b(ii), *supra*, a licensee and spectrum lessee also may, provided that the requisite conditions are met, convert a short-term *de facto* transfer leasing arrangement into a long-term *de facto* transfer leasing arrangement.

assignment of the lease, the parties involved in the *pro forma* transaction will be required to file a notification regarding the action subject to the same rules and procedures regarding *pro forma* transactions undertaken by licensees.[362]

186. *Transfer of control of spectrum lessees.* Similarly, we believe that we need to provide for the possibility that transfers of control of spectrum lessees will occur. In the case of spectrum manager leasing, we will require the licensee to notify the Commission, prior to consummation of a substantial transfer of control, pursuant to the same notification procedures required for spectrum manager leasing arrangements. Similarly, for leases involving a transfer of *de facto* control, because our consent to a lease application involves an assessment of the qualifications of the lessee, we will require that a lessee contemplating a transfer of substantive control obtain prior Commission consent, using the same procedures we have outlined above for *de facto* transfer leasing. Finally, should there be a *pro forma* transfer of control of the lessee, the parties involved in the *pro forma* transaction will be required to file a notification subject to the same rules and procedures regarding *pro forma* transactions undertaken by licensees.[363]

187. *Revocation or automatic cancellation of a license or of a spectrum lessee's operating authority.* For all spectrum leases discussed in this Report and Order, in the event we revoke an authorization held by a licensee that has entered into a lease arrangement, such revocation will require the lessee to terminate its operations since the spectrum lessee gains its access to the licensed spectrum through the licensee's authorization.[364] Similarly, a license may automatically cancel if the licensee fails to comply with certain defined requirements,[365] and the lessee similarly would be required to terminate its operations. In addition, we note that the lessee will have no greater right to obtain a comparable license than any other interested parties. If the Commission revokes the authority of a spectrum lessee to operate, that action by itself does not affect the status of the licensee before the Commission.

188. *Conditions regarding spectrum leasing arrangements entered into by licensees in the installment payment program.* We recognize that licensees currently participating in the Commission's installment payment program may seek to take advantage of the kinds of flexible spectrum leasing arrangements that we are facilitating by our action today. In permitting such licensees to enter into spectrum manager and *de facto* transfer leasing arrangements, we will require appropriate, commercially reasonable safeguards to ensure that they continue to meet their existing obligations to the Commission to pay license installment payment obligations. Accordingly, as a condition of participation in the new spectrum leasing opportunities set out in this Report and Order, licensees in the installment payment program, as well as their spectrum lessees (and any sublessees), will be required to take such actions and enter into such agreements that the Commission, in its discretion, determines are warranted to protect the integrity of the licensees' payment obligations for the licenses and the Commission's priority lien and security interest in the licenses and related proceeds (collectively "security interest").[366] To this end, we

---

[362] *See* 47 C.F.R. § 1.948(c)(1).

[363] *See id.*

[364] In the event we require service termination by a lessee, we will take into account the public interest in affording a reasonable transition period to users of the service in order to minimize disruption to business and other activities.

[365] For example, if a licensee that is participating in the installment payment program fails to make timely payment, its license will automatically cancel. *See* 47 C.F.R. § 1.2110(g)(4)(iii). Failure to meet construction or coverage requirements also leads to automatic license termination. *See* 47 C.F.R. § 1.946(c).

[366] These requirements will apply to both spectrum manager and *de facto* transfer leasing arrangements, so long as the underlying license is subject to installment payments.

delegate to the Wireless Telecommunications Bureau and the Office of Managing Director (Bureau/OMD) the authority to make these determinations and implement the appropriate safeguards, consistent with the following guidelines:

- For a licensee participating in the Commission's installment payment program entering into a spectrum leasing arrangement, any new or existing documentation evidencing the Commission's security interest (hereinafter "financing documents") should include express reference to spectrum leasing arrangements involving spectrum lessees, as provided for in this Report and Order. This documentation should, at the least, make it clear that the Commission's security interest covers the licensee's rights in the lease payments.

- Any spectrum lease agreement that provides for a lease of spectrum that is licensed under the installment payment program should contain provisions providing that: (a) any lease is subject to the execution of Commission-approved financing documents and the certification of such execution; (b) any lease can only be with lessees that are qualified to enter into such arrangements under the Commission's rules and regulations; (c) the lessee is required to comply with the Commission's rules and regulations and other applicable law, at all times, and give the licensee or the Commission the right to revoke, cancel, or terminate the lease for failure to comply; (d) the lessee may not hold itself out to the public as the holder of the license and the lessee will not have the right to nor under any circumstances undertake to hold itself out as a licensee by virtue of such lease; (e) the license remains subject to the Commission's security interest, and the lease is not an assignment, sale, or transfer of the license itself; and (f) the licensee will not consent to any assignment in whole or part of such a lease, regardless of whether or not the lessee is the subject of reorganization and/or liquidation proceedings in bankruptcy, a receivership, or otherwise, unless such action is in compliance with the Commission's rules and regulations. The Bureau/OMD should ensure that the appropriate financing documentation reflects the licensee's obligation to include the foregoing provisions in its spectrum leases.

- In addition to the foregoing, the Bureau/OMD may require the lessee or any sublessee to execute, as a condition of leasing, appropriate documentation that, *inter alia*, acknowledges (1) the Commission's status as a secured party, and (2) the Commission's right to execute and file documentation that it deems necessary to protect its license-based security interests (*e.g.*, financing and continuation statements) without the lessee's (or sublessee's) approval.

- Finally, with respect to licenses that are still subject to the installment payment program, no licensee or potential lessee may file a spectrum leasing notification or application (or otherwise participate in the leasing contemplated in this Report and Order) without first executing the Commission-approved financing documentation and so certifying, as described above.

189. *Bankruptcy or receivership.* Finally, we note the possibility that either a licensee or spectrum lessee may enter into bankruptcy or receivership during the term of a spectrum leasing arrangement. In such event, the measures described in the preceding paragraph will help ensure that the public's interest in recouping the full amount of a licensee's debt obligations to the Commission is not unduly compromised. In addition, we believe that in all cases (regardless of whether a debt is owed or not) the public interest is best served if a licensee's or lessee's regulatory obligations and responsibilities are clearly preserved during bankruptcy or receivership. Accordingly, we will require all leases – both

spectrum manager and *de facto* transfer spectrum leasing arrangements – to contain the following basic provisions:

- The spectrum lessee must comply with the Commission's rules and regulations and other applicable law at all times, and if the lessee fails to so comply, the lease may be revoked, cancelled, or terminated by either the licensee or the Commission.
- If the license is revoked, cancelled, terminated, or otherwise ceases to be in effect, the lessee has no continuing authority to use the leased spectrum, unless otherwise authorized by the Commission.
- The lease is not an assignment, sale, or transfer of the license itself.
- The lease shall not be assigned to any entity that is not eligible or qualified to enter into a spectrum leasing arrangement under the Commission's rules and regulations.
- The licensee will not consent to any assignment of the lease except to the extent such assignment complies with the Commission's rules and regulations.

7. Collection of Information on Spectrum Leasing

a. Background

190. In the *NPRM*, the Commission sought general comment on whether the Commission should have a role in collecting and disseminating information regarding spectrum leasing and actual usage.[367] The Commission tentatively concluded that the private sector would be better suited to identifying the types of information most appropriate for encouraging the growth of secondary markets as well as collecting such information.[368]

191. Some commenters requested that the Commission gather additional information to facilitate the development of secondary markets, and suggested the possibility of a national database or spectrum registry.[369] One commenter, for example, argued that a consolidated government database would be essential to reducing transaction costs in secondary markets and to enabling efficient spectrum use,[370] while another thought that maintaining an accurate database of spectrum rights would encourage greater confidence among participants in secondary trading, and would be essential to enabling spot markets to function.[371] One commenter specifically recommended that the Commission create an administrative mechanism that would track actual spectrum usage.[372] Other commenters, however, opposed any attempt

[367] *See NPRM* at ¶¶ 98-100.

[368] *See id.* at ¶ 100. We note also that the Commission concluded in the *Policy Statement* that spectrum leasing would provide significant economic incentives to encourage the development of mechanisms to gather and disseminate the relevant information. *See Policy Statement* at ¶ 39.

[369] *See, e.g.*, Cook Inlet Comments at 7; Kansas City Power Comments at 5; RTG Comments at 9; Shared Spectrum Company Comments at 3-5.

[370] *See* Shared Spectrum Company Comments at 3-5.

[371] *See* Macquarie Bank Reply Comments at 20.

[372] *See* RTG Reply Comments at 16 (contending that such a mechanism would allow the public to determine what entity is operating on a given frequency in a certain geographic area and provide contact information about the spectrum user).

by the Commission to maintain a database on leased spectrum or otherwise gather information on spectrum that is being leased, contending that this would be unreasonably burdensome on licensees and lessees or that private sector entities would be better suited to gathering information most useful to the development of secondary markets.[373]

b. Discussion

192. As a result of the policies and procedures we are adopting for spectrum leasing arrangements in this Report and Order, including the notification procedures for spectrum manager leasing and streamlined application procedures for *de facto* transfer leasing, the Commission will be making a significant amount of information available in ULS with regard to spectrum leasing. We anticipate that this information, combined with the information the Commission gathers in connection with its licensing process (*e.g.*, transfers of control, assignments of licenses), will be helpful to entities seeking to gain access to spectrum usage rights through leasing. At this time, we will not impose any additional information filing requirements with regard to spectrum leasing.

193. As noted in the *Policy Statement*, we generally believe that if the market is dependent upon this information to flourish, economic incentives will encourage private sector entities to undertake the task.[374] Spectrum brokers with specific expertise on the properties of different spectrum bands could match parties interested in acquiring spectrum usage rights with existing licensees.[375] Thus, we support the establishment of private spectrum exchanges and spectrum brokers, as well as the development of services that list spectrum resources that licensees are offering for sale or lease.[376] Also, we note that determining whether the Commission should collect any additional data to facilitate leasing raises several concerns that must be considered. For instance, such information may involve data (*e.g.*, areas of available spectrum) that could disclose a company's business plans or sensitive information to its competitors. Also, collection of this information would impose costs on the Commission as well as licensees. Before imposing any additional information collection role for the Commission, we would want to establish that such a role would bring important benefits that would not otherwise be adequately addressed.

194. Even though we take no action at this time, we will further explore this issue in the Further Notice because we believe that access to information is a necessary ingredient in promoting secondary markets, particularly for potential participants who may command fewer resources.[377]

B. Streamlined Approval Processes for License Assignments and Transfers of Control

1. Background

195. In seeking ways to facilitate the development of efficient secondary markets in spectrum usage rights, the Commission in the *Policy Statement* expounded upon the need to develop not only

---

[373] *See, e.g.*, El Paso Global Comments at 13 (agreeing with the Commission's conclusion that private sector entities would be better suited to the task of gathering information);Teligent Reply Comments at 11(arguing that maintenance of such a database would be unnecessary, and would discourage spectrum leasing by placing a burdensome requirement on both licensees and spectrum lessees).

[374] *See Policy Statement* at ¶ 39.

[375] *See id.*

[376] *See id.*

[377] *See* Section V.A.1, *infra.*

efficient and streamlined spectrum leasing policies but also policies that would streamline license assignments and transfers of control.[378] In particular, it noted that adopting more streamlined license assignment and transfer of control procedures would, as with spectrum leasing, encourage licensees to be more spectrum efficient, promote spectrum fungibility, minimize administrative delays, reduce transaction costs, and otherwise generally facilitate the movement of spectrum toward new, higher valued uses.[379]

2. Discussion

196. We extend the same type of streamlined approval procedures applicable to long-term *de facto* transfer leasing, as adopted above, to our approval procedures for license assignments and transfers of control in those services affected by our spectrum leasing policies.[380] Many of the public interest objectives and policy goals underlying our approach to long-term *de facto* transfer leasing apply with equal force to these transactions, and we will thereby achieve parity of treatment between these secondary market transactions by taking this action now in this Report and Order.

197. *Specific approval procedures.* The streamlined procedures that we adopt for processing license transfer or assignment applications will be implemented using Form 603, as revised to enable quicker processing.[381] Applications will be placed promptly on public notice once sufficiently complete.[382] Petitions to deny filed in accordance with Section 309(d)[383] will be due within 14 days of the initial public notice date. No later than 21 days following the initial public notice listing the transfer or assignment application, the Bureau will either affirmatively consent to, deny, or offline the application.[384] As with long-term *de facto* transfer leasing applications, where there are no issues requiring further review and if no petition to deny, opposition, or other comments concerning the lease application are filed, the consent will be reflected in the first public notice issued after the grant. If, on the other hand, any opposition is submitted, the Bureau will address the arguments raised in an order.[385]

198. If the Bureau determines, based upon its own review or in light of filings by interested parties, that there are issues that cannot be resolved within the abbreviated time frame, it will notify the applicants and remove the application from streamlined processing so that additional information that

---

[378] *See generally Policy Statement.*

[379] *See id.* at ¶¶ 1, 9, 12, 18-20, 32, 34; *see also Policy Statement on Principles for Spectrum Allocation*, 14 FCC Rcd at 19872 ¶ 13. In addition, we note that the *Spectrum Policy Task Force* supported the need for the Commission to identify ways in which it can streamline its regulatory processes in order to facilitate a range of secondary market activities – spectrum leasing as well as other transactions, whether transfers of control of licensees or assignment of licenses, in whole or in part. *See Spectrum Policy Task Force Report* at 15, 57.

[380] We discuss the specific services eligible for spectrum leasing and this streamlined processing for license assignments or transfer of control in Section IV.A.3, *supra.*

[381] The new information collection requires approval by the Office of Management and Budget.

[382] Applications involving licenses not subject to prior public notice requirements will not be placed on such public notices. *See* 47 C.F.R. §§ 1.933(c), (d).

[383] *See* 47 U.S.C. §§ 309(b)-(d).

[384] The filing of a petition to deny will not automatically lead to offlining the application from streamlined processing, although we will need to address the issues raised in any petition to deny.

[385] *See* 47 U.S.C. § 309(d)(2).

require further examination can be gathered.[386] If offlined from streamlined processing, the Bureau will issue a public notice so indicating. Within 90 days of that public notice, the Bureau will either take action upon the application or provide public notice that an additional 90-day period for review is needed. Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application. In addition, interested parties may seek reversal of a grant by filing a petition for reconsideration or an application for review.

199. *Forbearance from Section 309(b) requirements relating to 30-day notice and comment for common carrier licenses.* To the extent that the license transfers and assignments involve common carrier or CMRS licenses, our streamlining of the approval procedures to enable consent to an application within 21 days of issuance of the public notice require that we forbear from the Section 309(b) 30-day public notice and comment requirement.[387] We determine that the streamlining procedures we are adopting meets the statutory test for forbearance.

200. As discussed above,[388] the Commission may, pursuant to Section 10 of the Act, forbear from applying any regulation or provision of the Act to a telecommunications carrier or service, or class of telecommunications carriers or services, in any or some of its geographic markets, so long as the following three-prong test is satisfied: (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.[389]

201. Examining the first prong of the test for establishing forbearance, we find that a 30-day notice and comment period for license assignments and transfers of control is not necessary to ensure that a carrier's charges, practices, classifications, and services are just and reasonable, and not unjustly or unreasonably discriminatory. As noted above with regard to long-term *de facto* transfer leasing, information relevant to these particular determinations are not included in the applications, and a full 30-day public notice period is not necessary to achieve these objectives. In addition, since we expect that streamlining license assignments and transfers of control will promote more fluid markets in spectrum usage rights, enable providers to gain quicker control of the spectrum they need to increase or improve wireless services offered to the public, and otherwise benefit the public interest, we believe that facilitating quicker processing of these applications in fact will reinforce achievement of these objectives.

202. Similarly, with regard to the second prong of the Section 10 forbearance standard, we conclude that requiring a 30-day notice and comment period is not necessary for the protection of consumers. Using these procedures, the Commission will review all applications for transfers or assignments and, as noted above, interested parties will continue to have the opportunity to file

[386] To the extent the application fails to include information required by the Bureau to determine that the proposed lease meets our standards, the parties may be requested to provide additional information. This may necessitate removal of the application from streamlined processing to allow for submission and review of such data.

[387] *See* 47 U.S.C. § 309(c)(2)(B). The 30-day public notice and comment requirement set forth in Section 309(b) does not apply to Private Mobile Radio Service (PMRS) licenses. Accordingly, no forbearance from this requirement is necessary with regard to the many PMRS licenses that also are affected by the leasing procedures adopted in this Report and Order.

[388] *See* Section IV.A.5.b(i)(b)(iii), *supra.*

[389] 47 U.S.C. § 160(a).

comments. In the event a particular application raises issues that might have an adverse effect on consumers, the Commission retains the authority, as discussed above, to remove that application from streamlined processing for further review. Accordingly, forbearance from a 30-day public notice period will not deprive consumers of protection because our 21-day notice procedures allow adequate time for initial Commission review as well as an opportunity for subsequent review if necessary. We also note that the procedures we adopt will make it easier, with less cost and delay, for additional entities to gain access to spectrum so that it may be put to use for the ultimate benefit of consumers.

203. Finally, applying the third prong of the Section 10 forbearance standard, we determine that forbearance from the 30-day comment period required by Section 309(b) is consistent with the public interest. Forbearance will promote competition by allowing parties to transfer or assign spectrum authorizations without undue regulatory delay. As with spectrum leasing arrangements, we believe that a 21-day review period for license transfer or assignment applications will provide adequate time to determine whether a particular application has the potential to harm the public interest. During the 21-day period, we will review the application and evaluate the public interest implications of the proposed transaction. The efficiency gained by our expedited review process and streamlined procedures will increase carriers' ability to compete in the wireless marketplace, with benefits for consumers, in furtherance of our statutory goals. Such efficiency will promote competitive market conditions, thus enhancing competition among telecommunications service providers.

C. Secondary Markets in Satellite Services

1. Background

204. In the *NPRM*, the Commission requested comment on whether it should make various changes to its policies and rules in order to bolster secondary markets.[390] Specifically, it asked whether any changes were needed in the Commission's transponder lease or sales policy and whether any changes might make it easier to develop a market in the use of transponders or the leasing of rights to use satellite spectrum or improve the use of that satellite spectrum. It also inquired whether any changes in our earth station rules might help foster a more efficient secondary market. Finally, it asked whether the Commission should entertain requests to waive technical and service rules.[391] We received comments from four parties requesting different types of changes in our policies and rules.

205. New Skies requested that the Commission adopt limits for the downlink power from C-band satellites, which would also permit a gradual increase in allowed power. It also requested elimination of the requirement to license receive-only dishes of sufficient size to qualify for routine licensing, even when they are communicating with non-U.S. licensed satellites included on the Permitted Space Station List. New Skies further requested that only routinely licensed earth stations be allowed to communicate with space stations on the Permitted Space Station List without further authorization.[392]

206. SIA proposed that the Commission eliminate the need for prior Commission approval of *pro forma* transfers of control or assignments, as well as the requirement that a receive-only earth station operating with a non-U.S. licensed satellite on the Permitted Space Station List obtain a separate license to operate the station. SIA also opposed certain proposals regarding sharing between earth station operators and certain terrestrial users. In addition, SIA contended that there was no need for the

[390] *See generally NPRM* at ¶¶ 66-68.

[391] *Id.* at ¶ 68.

[392] New Skies Comments at 3-8.

Commission to have a greater role in collecting and disseminating information on licensed satellite spectrum.[393]

207. HBO contended that the Commission should more frequently entertain requests to waive technical and service rules. HBO also requested that the Commission clarify that satellite service operators should not be held responsible for the content of the material transmitted, arguing that such operators are not common carriers and do not have any control of the content of transmissions carried on their satellites.[394]

208. Finally, Teledesic recommended that satellite operators have the flexibility to subdivide and apportion the spectrum and lease their rights to various third-party users, as long as that does not interfere with a service's primary allocation. It also requested that the Commission relax its satellite anti-trafficking rules, which it argued hindered satellite companies from obtaining financing by selling equity in the company because the licensee had to prove that it was not "intending to profit" from the sale of its license. Further, Teledesic proposed that the Commission allow the leasing of dormant satellite spectrum, such as through short-term leases during the construction phase.[395] PanAmSat and GE American opposed Teledesic's proposal to allow short-term leasing of unoccupied satellite spectrum, stating that the means already exist, through the STA process, for operators to use spectrum on an interim basis.[396]

2. Discussion

209. Based on the record before us and the specific nature of the revisions that commenting parties proposed, we decide not to make changes to our Satellite Services in this Report and Order.[397] Several of these requests and recommendations raise issues that go beyond the focus of this proceeding and thus are more appropriately addressed in separate proceedings or are already being considered in other proceedings. Specifically, with respect to New Skies' request regarding revising downlink power limits from C-band satellites, New Skies raised this issue in response to Telesat's request to place ANIK F1 on the Permitted List, and the International Bureau found that there was no risk of harmful interference raised by the proposed satellite operations at issue.[398] Furthermore, New Skies raised this issue in response to the *Part 25 Earth Station Streamlining NPRM*.[399] We defer to that proceeding because that

[393] SIA Comments at 5-9; SIA Reply Comments at 2-4.

[394] HBO Comments at 1-2, 9. HBO further explained that, because satellite operators are concerned about the possibility of prosecution by federal or state authorities for violation of obscenity or indecency laws, those operators retain the right to suspend or terminate customer service if there is a threat of prosecution under federal or state laws. *Id.* at 2.

[395] Teledesic Comments at 5-9.

[396] PanAmSat and GE Americom Reply Comments at 1-2.

[397] We note that the spectrum leasing policies for the Wireless Radio Services adopted in this Report and Order are not intended to alter existing industry practices, approved by the Commission, regarding transponder leasing arrangements or to suggest that such leases would be subject to the procedures we adopt regarding Wireless Radio Services.

[398] Telesat Canada, Petition for Declaratory Ruling For Inclusion of ANIK F1 on the Permitted Space Station List, *Order*, 15 FCC Rcd 24828, 24834 ¶ 15 (Sat. and Rad. Div., Int'l Bur., 2000) (*First ANIK F1 Permitted List Order*); Telesat Canada, Petition for Declaratory Ruling For Inclusion of ANIK F1 on the Permitted Space Station List, *Order*, 16 FCC Rcd 16365, 16370 ¶ 11 (Int'l. Bur. 2001) (*Second ANIK F1 Permitted List Order*).

[399] *See* 2000 Biennial Regulatory Review – Streamlining and Other Revisions of Part 25 of the Commission's Rules Governing the Licensing of, and Spectrum Usage by, Satellite Network Earth Stations and (continued....)

record on this issue is better developed. New Skies' comments on the Permitted Space Station List are also beyond the scope of this proceeding. In any case, the International Bureau has previously explained that only routinely licensed earth stations are allowed to communicate with space stations on the Permitted Space Station List without further authorization.[400] Finally, the Commission is considering proposals to eliminate the routine licensing requirements for certain receive-only dishes in the *Part 25 Earth Station Streamlining NPRM*.

210. The request by SIA concerning *pro forma* transfers is more appropriately considered in other future proceedings that may review our overall satellite licensing procedures. Similarly, we deny HBO's recommendation that the Commission clarify liability for control of program content because that request is beyond the scope of this proceeding. In response to Teledesic's proposal to relax satellite anti-trafficking rules, we note that we recently eliminated those rules.[401] Finally, we determine that the rest of Teledesic's proposals, including its suggestions concerning allowing short-term satellite spectrum leases, raise issues that are inter-related with our due diligence or buildout rules and our ability to prevent potential interference among satellites and between satellites and terrestrial wireless licensees. As such, we conclude that they too are more appropriately considered in the context of specific rulemakings on those subjects.

211. In addition, we are not persuaded by HBO's suggestion that changes are necessary in our policies regarding requests for waivers of technical and service rules. We note that parties are free to petition the Commission at any time to waive any of its rules.[402]

212. Finally, we agree with SIA that, based on the record before us, there has been no demonstrable need for the Commission to have a greater role in collecting and disseminating information on licensed satellite spectrum. Accordingly, we will not take on such role at this time.

V. FURTHER NOTICE OF PROPOSED RULEMAKING

213. The Report and Order we adopt today represents an important first step in the effort to remove unnecessary regulatory constraints and better promote efficient use of available spectrum. In particular, the Report and Order policies set forth the legal basis for moving forward toward a more fluid marketplace in spectrum, balancing both the desire for more flexibility and the statutory constraints and responsibilities governing our actions. These steps are necessary underpinnings to taking further steps to build the spectrum environment we envision as a long-term objective.

214. Despite this progress in removing regulations that unnecessarily inhibit market transactions, we recognize that the steps taken in the Report and Order are limited in scope, addressing only the legal framework for certain types of leasing transactions involving exclusive use wireless licenses. In order to facilitate secondary markets and improve opportunities for more users to gain access to spectrum, we believe we must provide a greater range of incumbent licensees with the requisite regulatory framework as well as the practical capability and economic incentive to permit access to unused spectrum encompassed within their authorizations. Thus, additional actions by the Commission are needed to

---

Space Stations, *Notice of Proposed Rulemaking*, 15 FCC Rcd 25128 (2000) (*Part 25 Earth Station Streamlining NPRM*).

[400] *Second ANIK F1 Permitted List Order*, 16 FCC Rcd at 16368 ¶ 7.

[401] *See* Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 10760, 10839-10846 ¶¶ 209-225 (2003), *Erratum*, DA 03-2087 (rel. June 26, 2003), *Second Erratum*, DA 03-2861 (rel. Sept. 10, 2003).

[402] *See* 47 C.F.R. § 1.3.

further promote more flexible and, ultimately, more efficient use of the spectrum, with significant public interest benefits.

215. As the *Spectrum Policy Task Force Report* noted, the overarching goal of spectrum policy is to maximize the public benefits that are derived from spectrum-based services and devices.[403] In accordance with our statutory obligations, the Commission has balanced multiple competing objectives in the award of initial, mutually exclusive spectrum licenses through competitive bidding, including:

- the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

- promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

- recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and

- efficient and intensive use of the electromagnetic spectrum.[404]

The Commission has long recognized its critical role in ensuring that consumers have access to the broadest array of telecommunications services. One of the Commission's primary objectives is to promote opportunities for a wide variety of entities to participate in providing spectrum-based services. We seek to ensure that all qualified entities, including those who have innovative ideas for spectrum usage, can gain access to the spectrum necessary to effectuate their plans. How the Commission approaches opportunities to promote flexibility and increase access to spectrum therefore will play a critical role in determining whether, and to what extent, the public benefits from spectrum are maximized.

216. In many instances to date, for reasons based on economics, regulatory policy, or technology, licensees have been reluctant to permit access to their licensed spectrum, even if they currently foresee no use for it (whether by frequency or by geographic area). Yet access to this spectrum is becoming increasingly critical to ensure that the public can obtain the widest variety of innovative wireless services possible. As a consequence, there is a very real need for efficient secondary markets in which licensees have incentives to make available their unused spectrum and potential users have their needs met.[405]

217. To further this objective, we seek comment on various potential measures, beyond the steps initiated in the Report and Order, to promote the use of secondary markets to allow increased access to spectrum. We anticipate that, as technology continues to advance, the opportunities for flexible use will expand, transaction costs will decline, and the ability of spectrum licensees and potential new users to

---

[403] *Spectrum Policy Task Force Report* at 12.

[404] 47 U.S.C. §§ 309(j)(3)(A)-(D).

[405] *See generally Policy Statement* at ¶¶ 11-12.

trade in secondary markets will expand. We seek comment on this view, and on what role the Commission should play in facilitating these trends.

218. First, we request comment on how to encourage the development of mechanisms for providing necessary spectrum information to licensees with underutilized spectrum and those in need of access to spectrum. In order to facilitate the availability of spectrum in the secondary market and promote the efficient use of available spectrum, both incumbent licensees and potential users must have access to information about the spectrum that is available and the demand that exists for it. As detailed in the Report and Order, the Commission will play a role in providing some of this information through its licensing database. The data we collect as part of our licensing authority may not, however, be sufficient for interested parties to determine in all cases what spectrum in fact is being used and what spectrum might be available for other users. In order to facilitate marketplace transactions, there may also be a need for "market-maker" intermediaries to gather more detailed information regarding available spectrum and to bring potential holders and users of spectrum together. We seek comment on the type of information that interested parties may need, the potential for "market-maker" intermediaries to develop, and the nature of the Commission's role in regulating such intermediaries or otherwise facilitating access to spectrum information.

219. Second, we seek comment on what secondary market mechanisms are necessary to facilitate access to spectrum by new technologies.[406] As noted in the *Spectrum Policy Task Force Report*, these technologies have significant potential to make "opportunistic" use of licensed but unused spectrum for very short time intervals without causing interference to licensed spectrum users.[407] As a result, we believe there will be a demand for secondary market arrangements that reflect these technological capabilities. Although we cannot be certain precisely what form these arrangements will take, we anticipate that to accommodate use of spectrum by opportunistic devices in small time increments, there may be a need for a sophisticated clearinghouse mechanism to provide highly granular real-time spectrum information. We seek comment on whether such a clearinghouse is likely to evolve as a function of the marketplace, whether clearinghouse entities should be authorized by the Commission, or whether the Commission itself should act in a clearinghouse role. Under all of these alternatives, we also seek comment on what policies the Commission should set to ensure that any clearinghouse information exchange process is fair, transparent, and effective.

220. Third, we seek comment on whether to expand the scope of the measures taken in the Report and Order to allow more flexible regulatory treatment of secondary market transactions. Building on the legal framework we establish today, we believe there are opportunities for us to exercise our statutory forbearance authority with respect to requirements for Commission approval for certain categories of leases discussed in this order. We also seek comment on applying our leasing policies to additional spectrum-based services not covered by the Report and Order and on applying the new *de facto* control standard we have developed for leasing to non-leasing contexts.

[406] At the same time, our efforts to promote secondary market mechanisms do not preclude us from exploring unlicensed operations as a means of facilitating access to spectrum by new technologies. *See, e.g.*, In the Matter of Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, *Notice of Inquiry*, 17 FCC Rcd 25632 (2002).

[407] *See also Spectrum Policy Task Force Report* at 20-21.

A. Achieving a More Efficient Spectrum Marketplace

1. The Commission's Role in Providing Secondary Market Information and Facilitating Exchanges

a. Background

221. In the *Policy Statement*, we observed that the market for spectrum, unlike the market for most other goods and services, lacks an efficient means for identifying buyers and sellers, comparing prices, and completing transactions.[408] We also noted that negotiation for spectrum transactions can be complicated by the Commission's technical and service rules, and that approval of transactions by the Commission can involve complex submissions in a time-consuming and expensive process for the parties involved.[409]

222. To improve efficiency in the market for spectrum usage rights, we proposed in the *Policy Statement* to pursue options that would accomplish three tasks. First, we would look to maintain an on-line listing of licenses by service, frequency, and service area. As we noted in the *Policy Statement*, this would be the simplest means for identifying spectrum to potential buyers and sellers, but it would not identify specific spectrum that licensees might be willing to assign or lease. Second, we would support the development of services that list spectrum resources that licensees are actively offering for sale or lease. The *Policy Statement* noted that these services could provide more useful information than a simple on-line listing. Third, we would support the establishment of private spectrum exchanges and brokers who would match parties interested in acquiring spectrum usage rights with suitable resources held by existing licensees. The *Policy Statement* noted that spectrum brokers could bring specific expertise to the unique properties of different spectrum bands so as to assist buyers in best meeting their needs.[410]

223. Our vision for the future spectrum marketplace presumes that access to adequate information is essential for ensuring that improved secondary markets achieve the highest benefit for spectrum users and consumers. Entities desiring to obtain access to spectrum must be able to identify the potential suppliers of that access, and we seek to ensure that the costs of obtaining such information and entering into transactions governing spectrum access are not driven by regulatory constraints. Both factors suggest that more than a mere compilation of information is needed to facilitate efficient spectrum access and usage, and to realize the public interest benefits that will follow from achievement of this goal.

b. Discussion

224. There are a variety of approaches the Commission could pursue to promote access to spectrum information needed in the secondary marketplace. The simplest of these approaches – maintaining an on-line database of licensees, lessees, and certain other types of users – is most readily facilitated by Commission action. Specifically, because the Commission is responsible for issuing spectrum licenses and enforcing its rules and policies, it necessarily must collect certain basic and pertinent information, such as the names of licensees and the geographic areas and frequency bands for which they hold their authorizations.

---

[408] *Policy Statement* at ¶ 38.

[409] *Id.* at ¶ 39.

[410] *Id.*